PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

CATHERINE SHANNON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF LABOR, *ET AL.*, PETITIONERS,

v.

520 SOUTH MICHIGAN AVENUE ASSOCIATES, LTD., RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in conflict with other circuits and decisions of this Court, the court of appeals incorrectly held that a state statute cannot be a "minimum labor standard"—and therefore cannot survive preemption by the National Labor Relations Act, 29 U.S.C. §151 *et seq.*—if the law is tailored to account for occupational and regional differences or is "stringent" in its requirements.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is sought to be reviewed is as follows:

Defendant-Appellee/Petitioner: Catherine Shannon, Director of the Illinois Department of Labor.

Intervenor-Appellee/Petitioner: UNITE HERE Local 1.

Plaintiff-Appellant/Respondent: 520 South Michigan Avenue Associates, Ltd., d/b/a The Congress Plaza Hotel & Convention Center.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Catherine Shannon, Director of the Illinois Department of Labor, and UNITE HERE Local 1, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, App. 1a-47a, is reported at 549 F.3d 1119 (7th Cir. 2008). The opinion of the district court, App. 48a-76a, is unreported.

JURISDICTION

The Seventh Circuit Court of Appeals entered judgment on December 15, 2008, App. 1a-47a, and denied rehearing en banc on January 28, 2009, App. 81a. On April 28, 2009, Justice Stevens extended the time within which to file a petition for writ of certiorari until June 27, 2009. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. The Room Attendant Amendment to the Illinois One Day Rest in Seven Act ("Amendment"), 820 Ill. Comp. Stat. 140/3.1 (2008), is set forth at App. 82a-84a.

INTRODUCTION

In enacting the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, Congress did not "intend[] to disturb" the States' "'broad authority under their police powers to regulate the employment relationship to protect workers within'" their borders. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)). Rather, "Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety." *Ibid.* Accordingly, the NLRA does not preempt "minimum labor standard[s]" created by state law, *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 7 (1987), but instead "employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations," *id.* at 21 (quoting *Metro. Life*, 471 U.S. at 757). Applying these principles, this Court has repeatedly rejected claims that substantive workplace standards are preempted, see *Fort Halifax*, 482 U.S. at 19-23; *Metro. Life*, 471 U.S. at 748-758, and has similarly rejected a preemption challenge to suits to enforce such standards, see *Lividas v. Bradshaw*, 512 U.S. 107, 121-125 (1994).

The Court's serial rejection of preemption challenges to state minimum labor standards should have resulted in uniform precedent on the subject. But dif-

ferences over the proper reading of certain key terms in the Court's decisions have bred mischief and confusion in the lower courts, as exemplified by the decision below. More than twenty years after the Court's seminal preemption decisions on the subject, the Seventh Circuit in this case bemoaned what it perceived as "sparse" "guidance" on what constitutes a "minimum labor standard," App. 22a, and identified discord among lower court decisions over the proper scope of the States' authority to enact workplace protection legislation without running afoul of federal law, App. 24a-26a. Adopting the approach it deemed the "better reasoned" among the competing lower court analyses, App. 26a, the Seventh Circuit held that an Illinois statute requiring hotel employers in Cook County to provide periodic rest breaks to their room attendants is preempted by the NLRA.

The court determined that the rest break law in question is not a minimum labor standard because the law's protections are tailored to account for occupational and regional differences and are, in the court's view, overly "stringent." But this view—that lowest-common-denominator laws setting the same minimum standards regardless of material differences are not preempted, but that better-tailored laws are—is not only illogical, but it conflicts with the decisions of other federal and state courts of appeal, is impossible to square with this Court's precedents, and threatens a

myriad of existing state and local workplace laws. This Court should grant certiorari to provide state and local governments with essential guidance on the limits of their police power to regulate the workplace.

STATEMENT

1. The Amendment went into effect in 2005. It requires hotel employers to provide their room attendants with two fifteen-minute paid rest breaks and one thirty-minute unpaid meal period during each workday in which the room attendant works at least seven hours. See 820 Ill. Comp. Stat. 140/3.1(b), (c) (2008). Attendants who fail to receive the mandated break periods have a private cause of action for three times their regular hourly wage for each workday in which the breaks are not provided, and attendants are protected against retaliation for invoking their rights under the Amendment. See 820 Ill. Comp. Stat. 140/3.1(f), (g) (2008). The anti-retaliation provision creates a presumption of retaliation that the employer may rebut. See 820 Ill. Comp. Stat. 140/3.1(g) (2008).

2. As originally introduced in the Illinois legislature, the Amendment applied to all hotels in the State. See *Ill. Hotel & Lodging Ass'n v. Ludwig*, 869 N.E.2d 846 (Ill. App. Ct. 2007) ("*Ludwig*") (hereinafter, all citations to *Ludwig* are to the attached appendix). After "[l]egislators from downstate areas * * * stressed the different competitive pressures faced by hotels and

motels in their regions," a compromise bill was introduced that applied the law solely to hotels in Cook County, where Chicago is located. App. 92a. As adopted, the Amendment applies to all hotels and other transient occupancy establishments (union and nonunion alike) in Cook County. See 820 Ill. Comp. Stat. 140/3.1(b) (2008).

3. In 2007, the Illinois Appellate Court upheld the Amendment against a constitutional challenge brought by the Illinois Hotel and Lodging Association ("Association"), a statewide trade organization of hotels with members operating in Cook County. See App. 86a. The court rejected the Association's claims that the Amendment was preempted by the NLRA, as well as claims that the Amendment violated the Illinois Constitution's prohibition against special legislation and the federal and state Equal Protection Clauses. See App. 85a-86a.

The state appellate court determined that the Amendment "was introduced and passed to protect hotel room attendants from overwork." App. 87a. The evidence demonstrated that these "attendants essentially work on a piece-rate system," meaning that "[b]oth union and nonunion hotels require room attendants to clean a quota of rooms each work shift." App. 86a. Thus, "[a]lthough they are paid by the hour, room attendants are required to deliver a quantified amount of work during their shift and can be disciplined if they fail to do so." *Ibid.* The court found that many room

attendants skip rest breaks to meet their quotas, contributing to physical injury. See App. 87a. And the risk of injury has only increased in recent years, as hotels have added heavier mattresses, more pillows, and additional amenities to compete for travelers' business, resulting in an increased number and intensity of tasks required to clean a room. See *ibid.*

The Illinois Appellate Court then rejected the Association's state law and federal equal protection claims, which were premised on the Amendment's application in Cook County alone, because the Illinois General Assembly's decision to treat hotels located in Cook County differently from hotels located elsewhere in the State was reasonable. See App. 93a-95a. As the court explained, "Cook County has more hotel room attendants than the rest of the State combined," and "the revenue per available room for all Chicago hotels * * * was higher than any other area of the State." App. 84a. "The legislature rationally could have concluded from such evidence that [the Amendment] would protect hotel room attendants from overwork in the jurisdiction where the majority of such employees would be impacted and in the jurisdiction best positioned to absorb the costs of [the] new regulations." App. 94a-95a.

The court further rejected the Association's claim that the Amendment is preempted under either the "*Garmon*," see *San Diego Bldg. Trades Council v.*

Garmon, 359 U.S. 236 (1959), or the "*Machinists*," see *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976), doctrine of NLRA preemption. See App. 95a-102a.[1] The court explained that because the Amendment "'affect[s] union and nonunion employees equally'" and "'neither encourage[s] nor discourage[s] the collective-bargaining processes that are the subject of the NLRA,'" it is "a minimum labor standard" and thus survives under this Court's labor preemption cases.

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[1] *Garmon* preemption precludes States from regulating activity arguably protected by section 7 of the NLRA (protecting employees' rights to self-organization, to bargain collectively, to form, join, or assist labor organizations, and to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as to refrain from these activities, 29 U.S.C. § 157) or prohibited by section 8 (prohibiting unfair labor practices by employers and labor organizations, see 29 U.S.C. § 158). See *Garmon*, 359 U.S. at 241-245. *Machinists* preemption bars state regulation of conduct that Congress neither protected through section 7 nor prohibited though section 8 but instead "left 'to be controlled by the free play of economic forces.'" *Machinists*, 427 U.S. at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)). *Machinists* thus precludes States from enacting laws that interfere with the collective bargaining process, such as laws requiring employers to settle labor disputes to receive regulatory permits. See *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 615-616 (1986).

App. 101a (quoting *Metro. Life*, 471 U.S. at 755). The Supreme Court of Illinois declined the Association's request for leave to appeal. See *Ill. Hotel & Lodging Ass'n v. Ludwig*, 875 N.E.2d 1111 (Ill. 2007).

4. While *Ludwig* was pending in the Illinois courts, respondent, which is not a member of the Association, filed this action in federal court, raising claims similar to the ones that would fail in that case—that the Amendment violates due process, equal protection, and Illinois's prohibition against special legislation, and is preempted by the NLRA and the Labor Management Relations Act ("LMRA"). See App. 8a. On petitioners' motions to dismiss, the district court upheld the Amendment, finding the Illinois Appellate Court's opinion rejecting "almost identical" federal claims in *Ludwig* to be "well-reasoned" and "persuasive," and declining jurisdiction over the supplemental state-law claims. App. 50a, 76a.

5. On appeal, the Seventh Circuit rejected the result reached by the state appellate court, reversed the district court, and held that the Amendment is preempted by the NLRA under the *Machinists* doctrine. See App. 46a-47a. The court acknowledged that *Machinists* preemption "is concerned with the process and not the substantive terms of the bargain," whereas the Amendment "establishes a substantive requirement" rather than working a direct change to the process of bargaining and self-organization. App.

38a. And the court further recognized this Court's holdings that "minimum labor standards," which are not preempted by the NLRA, are defined as those that "'affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA.'" App. 22a-23a (quoting *Metro. Life*, 471 U.S. at 755). Finally, the court acknowledged that the Amendment both "facially affects union and nonunion employees equally," App. 23a, and in practice applies to both union and nonunion attendants because "not all room attendants in Cook County are unionized," App. 32a. The court nevertheless held that the Amendment did not qualify as a minimum labor standard.

The court reasoned that—although the Amendment applies to union and nonunion workers alike—it cannot set a "genuine minimum labor standard" because it "is not a statute of general application." App. 23a. According to the court, the Amendment's "narrow scope of application," to room attendants in Cook County hotels, "serves as a disincentive to collective bargaining," App. 30a, and thereby runs afoul of the NLRA. For this conclusion, the Seventh Circuit relied on *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995). The court acknowledged that the Ninth Circuit has since repudiated *Bragdon*'s characterization of minimum labor standards as laws "applicable to all employees," *id.* at 502. See App. 26a (noting holding of *Associated*

Builders & Contractors of S. Cal., Inc. v. Nunn, 356 F.3d 979, 990 (9th Cir. 2004), that "state substantive labor standards * * * are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market"). But the Seventh Circuit deemed the *Bragdon* approach "better reasoned" than the later decisions rejecting it. App. 26a. The court further recognized that a "series of cases," including decisions of this Court, the Ninth Circuit, and the D.C. Circuit, had upheld workplace protection laws "that apply only to particular occupations, industries or categories of employers" against preemption challenges, but distinguished the instant case because it addressed a law limited "by location" as well as "by trade." App. 25a-26a.[2]

In addition, the Seventh Circuit also reasoned that the Amendment does not qualify as a minimum labor standard because "minimum" "implies a low threshold." App. 34a. According to the court, the Amendment's protections do not comprise a "true minimum labor

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[2] The Seventh Circuit purported to distinguish *Fort Halifax*, 482 U.S. 1; *Dillingham Construction N.A., Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999); *Viceroy Gold Corporation v. Aubry*, 75 F.3d 482 (9th Cir. 1996); *National Broadcasting Company v. Bradshaw*, 70 F.3d 69 (9th Cir. 1995); and *Washington Services Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995), on this ground. App. 25a-26a.

standard" because they are "higher" than those for other Illinois workers, App. 32a-33a; they are too "stringent," App. 38a; and, in the court's view, they "would be very difficult for any union to bargain for," App. 35a. As a result, the court hypothesized, the mandated rest breaks would "interfere" with room attendants' pay and quota structure under respondent's expired collective bargaining agreement, and the Amendment's rebuttable presumption of retaliation would similarly undermine the dispute-resolution mechanisms set forth in that agreement. App. 40a-43a.

REASONS FOR GRANTING THE PETITION

In using *Machinists* preemption to invalidate a state workplace law applicable to union and nonunion employees alike, the Seventh Circuit broke from this Court's definition of a "minimum labor standard" in *Metropolitan Life* and *Fort Halifax*. The Seventh Circuit's redefinition of a "minimum labor standard" conflicts with both federal and state appellate court decisions, including a ruling by the Illinois Appellate Court rejecting the same preemption challenge to the same Illinois law. Moreover, the Seventh Circuit's decision contributes significantly to uncertainty over the scope of state and local power to enact workplace protection laws, and it casts doubt on myriad of laws governing the workplace already on the books. Only this Court can impose much-needed clarity on this critical area of state and local lawmaking, and establish

definitively—notwithstanding the Seventh Circuit's decision in this case, resurrecting a Ninth Circuit ruling whose reasoning that court has disavowed—that federal law does not require States wishing to provide workplace protections to do so only with untailored, one-size-fits-all rules.

I. Courts Are Divided Over Whether Targeted Minimum Labor Standards Are Preempted By The NLRA.

1. The Seventh Circuit's determination that the Amendment is not a "minimum labor standard" is impossible to reconcile with decisions of the Second, Ninth, and D.C. Circuits. These cases recognize that, to avoid preemption, state laws need only be general in the sense that they apply to union and nonunion workers alike (as all agree the Amendment does). See *Metro. Life*, 471 U.S. at 753; *Fort Halifax*, 482 U.S. at 19-20. Nothing in these cases limits the States' ability to tailor workplace protections based on geographical and/or occupational differences.

Indeed, in holding that the Amendment's "narrow scope" prevented it from being a minimum labor standard, App. 30a, the Seventh Circuit recognized that "a series of cases" have held that regulations that "apply only to particular occupations, industries or categories of employers have survived preemption challenge[s]," App. 25a. But the court below relied on the Ninth Circuit's decision in *Chamber of Commerce v.*

Bragdon, which it characterized as "better reasoned" than conflicting decisions that have rejected the *Bragdon* approach. App. 26a. *Bragdon* held that a county ordinance prescribing wage and benefit levels for private construction contractors was preempted under the *Machinists* doctrine. See 64 F.3d at 504. The Ninth Circuit reasoned that the ordinance was "incompatible with the goals of the NLRA" because it "provide[d] for specific minimum wages and benefits to be paid to each craft and only to those workers who are engaged in the specific construction projects covered by the Ordinance." *Id.* at 501, 502. In line with *Bragdon*, it was thus critical to the Seventh Circuit's preemption analysis that the Amendment "lack[ed] * * * general application." App. 29a. The court ultimately concluded that to survive preemption, a minimum labor standard must target substantially all of the labor market. See *ibid.* On this point—essential to the holding below—the Seventh Circuit's decision is in square conflict with other decisions of the Ninth Circuit, as well as the rule in the Second and D.C. Circuits.

First, although downplayed by the Seventh Circuit, see App. 28a-29a n.9, the Ninth Circuit itself has rejected the *Bragdon* analysis on which the decision below relied. Thus, in *Dillingham Construction N.A., Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), the court held that a law requiring payment of prevailing wages to apprentices on public construction

projects was a "minimum labor standard[] immune from NLRA preemption." *Id.* at 1039; see also *Viceroy Gold Corp. v. Aubrey*, 75 F.3d 482, 489-490 (9th Cir. 1996) (overtime law applying only to miners not preempted); *Nat'l Broad. Co., Inc. v. Bradshaw*, 70 F.3d 69, 71-72 (9th Cir. 1995) (same for law applying only to broadcast employees).

Subsequently, in *Associated Builders & Contractors of Southern Califorina, Inc. v. Nunn*, 356 F.3d 979 (9th Cir. 2004), the court expressly rejected *Bragdon* in holding that a law requiring contractors to pay registered apprentices on private construction projects certain wage rates based on their "craft and geographical area"—just like the ordinance challenged in *Bragdon*—was not *Machinists* preempted. *Id.* at 983, 990-991. The court warned that "*Bragdon* must be interpreted in the context of Supreme Court authority and our other, more recent rulings on NLRA pre-emption," which make clear that "the NLRA does not authorize us to pre-empt minimum labor standards simply because they are applicable only to particular workers in a particular industry." *Id.* at 990; accord *ibid.* ("It is now clear * * * that state substantive labor standards * * * are not invalid simply because they

apply to particular trades, professions, or job classifications rather than to the entire labor market.").[3]

Not only does the Seventh Circuit's decision part ways with current Ninth Circuit case law, but it is also inconsistent with the rule adopted by the Second and D.C. Circuits. In *General Electric Company v. New York Department of Labor*, 891 F.2d 25 (2d Cir. 1989), the Second Circuit upheld New York's prevailing wage law against a claim that it was NLRA preempted because it was not universal in scope, applying only to public works contracts, see *id.* at 26, 27-28; see also *Roundout Elec., Inc. v. NYS Dep't of Labor*, 335 F.3d 162, 169 (2d Cir. 2003) (declining to follow *Bragdon*). The Second Circuit adopted the reasoning of the district court, see *id.* at 27, that it "d[id] not matter that the coverage of the statute is limited." *Gen. Elec. Co. v. N.Y. State Dep't of Labor*, 698 F. Supp. 1093, 1098 (S.D.N.Y. 1988). As the district court had explained, "coverage of minimum wage statutes is rarely universal"; accordingly, that "the state ha[d] a rational reason for applying this statute to the employees of private contractors engaged in performing public work and for setting its minimum standards at the level it has selected" was sufficient to sustain the law. *Ibid.* It was similarly irrelevant that

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[3] Although *Nunn* rejected *Bragdon*'s reasoning, it did not overrule *Bragdon*, see 356 F.3d at 990-991, adding to the confusion in the lower courts.

the prevailing wage law required minimum wages in excess of those applicable to other occupations: "The common thread in the Supreme Court's 'minimum labor standard' concept is not a dictionary definition of 'minimum,' nor a requirement that the minimum standards be neutral in their effect on the collective bargaining process, but a judgement that the substantive rights which the state seeks to create are consistent with the 'general legislative goals of the NLRA.'" *Id.* at 1100 (quoting *Metro. Life*, 471 U.S. at 757).

Likewise, in *Washington Services Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995), the D.C. Circuit upheld labor legislation requiring only "contractors who employ 25 or more persons and perform food, janitorial, maintenance, or non-professional health care services" to retain a predecessor's employees for ninety days after taking over a service contract. *Id.* at 813-814. In rejecting a *Machinists* preemption claim to this targeted law, the court held that the NLRA "does not preempt local regulation of *any* facet of the employment relationship, but rather only those laws that disturb the labor dispute resolution system established by the NLRA." *Id.* at 817 (emphasis in original). Because the law at issue was "substantive employee protective legislation having nothing to do with rights to organize or bargain collectively," *Machinists* preemption did not apply. *Id.* at 818.

Thus, the result under *Bragdon* and in the Seventh Circuit would have been different in either the Second or D.C. Circuits; the fact that legislation applied only to certain workers would have subjected it to *Machinists* preemption in those cases. The Third Circuit has declined to follow *Bragdon* on this point as well, as have the California courts. See *The St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of the United States Virgin Islands*, 218 F.3d 232, 244 (3d Cir. 2000); *S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 140 Cal. App. 4th 1085, 1102-1103 (2006).[4]

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[4] Beyond relying on *Bragdon*, the Seventh Circuit supported its view that only laws applying to substantially all of the labor market qualify as minimum labor standards with citations to *Barnes v. Stone Container Corporation*, 942 F.2d 689 (9th Cir. 1991), and *Hull v. Dutton*, 935 F.2d 1194 (11th Cir. 1991). See App. 24a-25a. But *Barnes* did not involve a challenge to a minimum labor standard, but rather whether an individual could invoke Montana's Wrongful Discharge Act during an impasse in collective bargaining negotiations. See 942 F.2d at 693. And in *Hull*, the challenged Alabama statute applied only to the State's own employees, making it "an expression of the state's power as an employer to regulate relations with its employees, rather than the state's authority to regulate in the interest of the health, welfare, and mores of its citizens." 935 F.2d at 1198-1199. The Seventh Circuit's misreading of these cases is additional evidence of confusion over the meaning of the term "minimum labor standard."

2. The decision below makes an effort to distinguish some of the cases in the foregoing line by observing that the Amendment is limited geographically as well as by trade, but this observation is of no legal moment and does nothing to reconcile the Seventh Circuit with other courts. Such geographic targeting is a common and necessary feature of laws in Illinois and elsewhere. The Amendment, as originally drafted, would have applied statewide. See App. 91a. But, as the Seventh Circuit itself has recognized, Chicago and Cook County differ fundamentally from the rest of the State. See *Hearne v. Bd. of Educ. of City of Chicago*, 185 F.3d 770, 774 (7th Cir. 1999) ("the Illinois statute books are riddled with laws that treat communities with more than 500,000 residents—*i.e.*, Chicago—differently from smaller ones"). The Amendment thus was limited to Cook County after downstate hotels successfully demonstrated that Cook County's hotel industry differed fundamentally from that in other areas of the State. See App. 94a-95a. The Illinois legislature appropriately "concluded from such evidence that [the Amendment] would protect hotel room attendants from overwork in the jurisdiction where the majority of such employees would be impacted and in the jurisdiction best positioned to absorb the costs of [the Amendment's] new regulations." *Ibid.*

Nor is Cook County merely "one of Illinois's 102 counties," as the Seventh Circuit described it. App. 26a.

With 5.3 million residents (forty-three percent of Illinois's population), Cook County is among the largest counties in the nation and has a population exceeding that of twenty-nine States. See http://quickfacts.census.gov/qfd/states/17/17031.html (last visited Jun. 26, 2009) (Cook County); http://www.census.gov/statab/ranks/rank01.html (last visited Jun. 26, 2009) (State rankings). Given Cook County's substantial population and concentration of hotels, the Seventh Circuit's concern about the geographic scope of the Amendment is nonsensical. That leaves only the fact that the Amendment does not apply statewide, but that is logically immaterial. If state subdivisions may pass workplace protection laws—as they routinely do, see *infra* pp. 39-40, it is inconceivable that a state law limited to an area with a larger population risks any greater interference with federal labor law.

3. Finally, the decision below not only is irreconcilable with the rulings of three circuit courts, but it also creates a conflict between state and federal law within the Seventh Circuit. The Seventh Circuit invalidated the Amendment notwithstanding that the Illinois Appellate Court had recently upheld it against an identical preemption challenge. These conflicting rulings leave petitioner Shannon, who is charged with enforcing the Amendment, see 820 Ill. Comp. Stat. 140/6 (2008), in an untenable situation requiring this Court's intervention.

The Illinois Appellate Court's decision is *res judicata* as to every hotel belonging to the Association that brought that case. See, *e.g.*, *Rein v. David A. Noyes & Co.*, 665 N.E.2d 1199, 1204 (Ill. 1996); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227, 1233 (2d Cir. 1977).[5] And while Illinois courts must follow this Court on issues of federal preemption, they are not bound by the Seventh Circuit's preemption decisions, see, *e.g.*, *Weiland v. Telectronics Pacing Sys., Inc.*, 721 N.E.2d 1149, 1153-1154 (Ill. 1999); *Hinterlong v. Baldwin*, 720 N.E.2d 315, 323 (Ill. App. Ct. 1999), meaning that even non-Association members (other than respondent) remain subject to enforcement actions. For these entities, *Ludwig* is *stare decisis* in the Circuit Court of Cook County, the only jurisdiction where the Amendment applies. See, *e.g.*, *People v. Carpenter*, 888 N.E.2d 105, 111 (Ill. 2008); *Delgado v. Bd. of Election Comm'rs of City of Chicago*, 865 N.E.2d 183, 188 (Ill. 2007). As a practical matter, however, petitioner Shannon is reluctant to flout the

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[5] The Seventh Circuit's rejection of *Ludwig* does not change this result. See, *e.g.*, *Rhoades v. Casey*, 196 F.3d 592, 602 (5th Cir. 1999); *Bd. of Trs. of Carpenters Pension Fund for N. Cal. v. Reyes*, 688 F.2d 671, 673 (9th Cir. 1982).

holding of the Seventh Circuit. As a result, she is inhibited from performing her statutory duty to enforce the Amendment.

Illinois is not the only State in which a state and federal court are at odds over whether a law must be broadly applicable to constitute a "minimum labor standard." For example, although the Ninth Circuit has yet to overrule *Bragdon* expressly, that case has been squarely rejected by California's state appellate court. In upholding a prevailing wage requirement limited to workers on one type of construction project against a *Machinists* challenge, the California Court of Appeal "decline[d] to follow *Bragdon*," which the court described as "inconsistent" with this Court's "rule * * * that state regulation of the substantive terms of employment * * * is not subject to *Machinists* pre-emption." *S. Cal. Edison,* 140 Cal. App. 4th at 1103-1104 (citing *Metro. Life*, 471 U.S. at 758).

Thus state officials face a legal dilemma: is their authority to regulate workplace standards limited to laws applicable to substantially all of the labor market—as *Bragdon* and the Seventh Circuit hold—or may they, as their own state courts have determined, target workplace protections to categories of workers who really need them and employers that can best tolerate them. This intra-State uncertainty is an additional reason why this Court should grant certiorari review.

II. The Decision Below Is Incompatible With Decisions Of This Court.

After bemoaning that this Court's "guidance" on what constitutes a "minimum labor standard" is "sparse," App. 22a, the Seventh Circuit proceeded to fundamentally alter the concept. According to the court, the Amendment does not qualify as a "minimum labor standard" because it is "not a statute of general application," App. 23a, but rather is targeted to a particular occupation in a particular locale. The court further sought to bolster its holding by characterizing the statute as exceeding "a low threshold" and as unduly "stringent." App. 34a, 38a. But on top of breaking from other circuits, the Seventh Circuit's doctrinal innovations are incompatible with this Court's cases, which make clear that the term "minimum labor standard" merely denotes a substantive labor standard applicable to union and nonunion workplaces alike. Even the Seventh Circuit acknowledged that the Amendment easily satisfies this definition. See App. 23a (Amendment "facially affects union and nonunion employees equally"). The court should have gone no further.

1. In *Metropolitan Life*, this Court rejected an NLRA preemption challenge to a Massachusetts law requiring minimum mental-healthcare benefits for all employees, including those subject to benefit plans negotiated pursuant to collective-bargaining agree-

ments. See 471 U.S. at 727, 758. The Court expressly disapproved the view that required-benefit laws like Massachusetts's were preempted because they "in effect mandate terms of collective-bargaining agreements," and thereby remove "the choice of terms" in such agreements from "the free play of economic forces." *Id.* at 748. As the Court explained, "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck." *Id.* at 753. In addition, there generally is "no incompatibility" "between federal rules designed to restore the equality of bargaining power[] and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements." *Id.* at 754.

This Court thus determined that Congress did not intend the NLRA to displace state laws that are "unrelated * * * to the processes of bargaining or self-organization." *Metro. Life*, 471 U.S. at 756. Rather, States are free to enact "minimum labor standards" pursuant to their "'broad authority under their police powers to regulate the employment relationship to protect workers.'" *Id.* at 755, 756 (quoting *DeCanas*, 424 U.S. at 356). "Minimum labor standards," the Court further explained, are laws that "affect union and nonunion employees equally," and, thus, they are not preempted under *Machinists* because they "are not laws

designed to encourage or discourage employees in the promotion of their interests collectively" but, instead, "'give specific minimum protections to *individual* workers and * * * ensure that *each* employee * * * receive[s]'" statutorily mandated protections. *Id.* at 755 (quoting *Barentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (emphasis in original)).

2. Subsequent to *Metropolitan Life*'s holding that state "minimum labor standards" are not preempted by the NLRA, this Court in *Fort Halifax* made clear that a state law need not be applicable to substantially all of the labor market to qualify as such a standard, for the Court in that case sustained a narrowly targeted statute against an NLRA preemption challenge. The Court upheld a Maine law requiring an employer that terminates operations at a plant with one hundred or more employees (or relocates those operations more than one hundred miles away) to provide severance pay to any employee who had worked in the plant for more than three years. See 482 U.S. at 4 n.1, 5, 23. Thus, the state statute was not broadly applicable; it applied only to larger plant closings, distant relocations, and longer-tenured employees.

Even though the law was limited in its application, this Court upheld the Maine statute as a "minimum labor standard" akin to the one sustained in *Metropolitan Life*. Like the Massachusetts law, Maine's plant-closing law "provide[d] protections to individual

union and nonunion workers alike, and thus 'neither encourage[d] nor discourage[d] the collective-bargaining processes that are the subject of the NLRA.'" 482 U.S. at 20-21 (quoting *Metro. Life*, 471 U.S. at 755). The Court acknowledged that "the Maine statute g[ave] employees something for which they otherwise might have to bargain," but the same could be said for almost any workplace law, and "'there is nothing in the NLRA * * * which expressly forecloses all state regulatory power with respect to those issues * * * that may be the subject of collective bargaining.'" *Id.* at 21-22 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504-505 (1978)); see also *id.* at 21 ("the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of preemption"). In short, the Maine statute was "'a valid and unexceptional exercise of the [State's] police power.'" *Id.* at 22 (quoting *Metro. Life*, 471 U.S. at 758) (alteration in original).

3. Notwithstanding the actual holdings of *Metropolitan Life* and *Fort Halifax*, the Seventh Circuit, like the Ninth Circuit in *Bragdon*, seems to have been led astray by some of the more general language in those decisions. The court below focused on the use of the phrase "laws of *general application*" in *Metropolitan Life* to describe minimum labor standards, App. 23a (emphasis in original), and the description of such standards as "minimal" and as a "backdrop" to negoti-

ations in *Metropolitan Life* and *Fort Halifax*, respectively, App. 34a. Contrary to the Seventh Circuit's approach, however, nothing in this Court's decisions indicates that these references were intended to bar States from adopting anything but "low threshold" or untailored laws that apply broadly to all sectors of the labor market.

As explained, *Metropolitan Life* itself held that "minimum labor standards" are those that "affect union and nonunion employees equally." 471 U.S. at 755. And the Court's reference to a "law of general application," *id.* at 750 n.28, 753, was derived from *New York Telephone Company v. New York State Department of Labor*, 440 U.S. 519 (1979), where a plurality of the Court used the phrase to distinguish laws targeting unionized workplaces, see *id.* at 533 ("Section 591(1) is not a 'state la[w] regulating the relations between employees, their union and their employer,' as to which the reasons underlying the pre-emption doctrine have their 'greatest force.' Instead * * * the statute is a law of general applicability.") (internal citation omitted).

This view is consistent with this Court's approval in *Fort Halifax* of a narrowly-targeted law and with the State's recognized police power authority to regulate the employment relationship. The Seventh Circuit sought to distinguish the Amendment from Maine's plant-closing law by claiming that the latter, although admittedly not universally applicable, "still had a very

broad application." App. 24a. But the court made no effort to explain why a plant-closing law targeted to only a limited class of large businesses in a very small State is more broadly applicable than a law targeted to one occupation in a county that is larger than 29 States. Rather, it reasoned merely that the Amendment's limitation to one Illinois county "serves as a dimin.-centime to collective bargaining" and "makes it possible to target union-heavy counties (or union-light counties), and thus reward (or punish) union activit[ies]." App. 30a, 32a. But this Court rejected precisely these claims in *Fort Halifax*. There, the Court noted that "[t]h[e] argument—that a State's establishment of minimum substantive labor standards undercuts collective bargaining—was considered and rejected in *Metropolitan Life*," 482 U.S. at 20, thus doing away with the Seventh Circuit's concern about "disincentiv[es]" to collective bargaining. And as for the suggestion that the Amendment might affect in practice union workplaces more heavily than nonunion, *Fort Halifax* also rejected an argument that the Maine statute was preempted because it "d[id] not fall equally upon union and non-union employees." *Id.* at 22 n.15.

Indeed, the idea that a workplace standard is preempted because it affects a trade or locale meeting some undefined threshold of unionization not only conflicts with this Court's precedents but would make it impossible for States to set workplace standards in any

industry with a significant union presence, even when large numbers of the affected workforce were non-unionized. This result, which "penalizes] workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimal standards on nonunion employers," "would turn the policy that animated the [NLRA] on its head." *Metro. Life*, 471 U.S. at 756. The Seventh Circuit's appoach also is unworkable in practice, for it offers no meaningful standard for determining when an industry or locale is sufficiently "union-heavy" or "union-light" to trigger federal preemption. Thus, the Seventh Circuit's reliance on the phrase "law of general application" to invalidate the Amendment because of its targeted scope is inconsistent with this Court's holdings and their underlying rationales.

4. The Seventh Circuit's decision also resulted from a lack of clarity in the term "minimum labor standard" itself. Pointing to this Court's characterization of minimum labor standards as involving "minimal substantive requirements," App. 34a, the lower court held that the Amendment "does not qualify as a 'minimum' labor standard" because "'[m]inimum,' * * * implies a low threshold," whereas the Amendment "establishes terms of employment that would be very difficult for any union to bargain for," App. 34a-35a; see also App. 38a

("[t]he more stringent a state labor substantive standard, the more likely it is that the state law interferes with the bargaining process").

But this interpretation of the phrase "minimum labor standard" is incompatible with the rationales of *Metropolitan Life* and *Fort Halifax*. Speculation about whether a statutorily mandated benefit would have been "difficult" to achieve in bargaining played no role in the Court's analysis in these cases. In fact, the nature of the benefits at issue refutes the Seventh Circuit's view that only insubstantial state regulations may escape NLRA preemption: neither the severance-pay provision in *Fort Halifax* (requiring one week's pay for each year of employment to all employees who had worked more than three years, see 482 U.S. at 4 n.1) nor the mental-healthcare benefit in *Metropolitan Life* (requiring coverage for "'mental or nervous conditions'" that provides sixty days per year in a mental hospital and treats confinement in a general hospital "'no differently] than * * * any other illness,'" 471 U.S. at 730 n.11) (quoting statute), may fairly be characterized as a law with "minimal substantive impact" on collective bargaining agreements, App. 34a.[6]

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[6] Indeed, the *Metropolitan Life* Court cited with approval myriad state mandated-benefit laws, none of which satisfy the Seventh Circuit's "low threshold" requirement. See 471 U.S. at 730 n.10 (describing state laws requiring "alcoholism

(continued...)

Equally misplaced is the Seventh Circuit's view that the Amendment is not a "true minimum labor standbeen" because the Illinois One Day Rest in Seven Act, which the Amendment modified, "already established a minimum labor standard for breaks." App. 32a-33a. Under the court's analysis, once a State sets a labor standard that applies broadly, it may never adopt different standards later for occupations warranting greater protection. This is a radical and novel limitation on the States' "great latitude" and "'broad authority under their police powers to regulate the employment relationship to protect workers,'" including by responding to unique and changing workplace conditions. *Metro. Life*, 471 U.S. at 756 (quoting *DeCanas*, 424 U.S. at 356). It also is an unwise limitation, for it favors one-size-fits-all legislation over more carefully tailored lawmaking. Rather, as the Court's endorsement of substantial state workplace regulation in *Metropolitan Life* and *Fort Halifax* makes plain, the term "minimum labor standard" simply means a floor from which individuals and unions must negotiate upwards.

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[6] (...continued)
coverage," "certain birth-defect coverage," "outpatient kidney-dialysis coverage," and coverage for "reconstructive surgery for insured mastectomies"). To say the least, these substantial and costly benefits might well be difficult for union negotiators to achieve in bargaining.

Not only is the Seventh Circuit's rule inconsistent with this Court's decisions, but it is unworkable. The court set forth no standard for determining whether a workplace law is too "stringent" or provides a benefit that would be "very difficult for any union to bargain for." App. 35a-38a. As a result, the rule is an invitation to prohibited judicial second-guessing of economic legislation. See *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124 (1978); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curia*).

5. The Seventh Circuit also broke from this Court's case law in suggesting that federal law preempts workplace regulations without an "opt-out" for labor agreements setting different standards. See App. 33a. The court concluded that "when the parties are not free to devise their own arrangement preemption applies because the statute intrudes on the collective bargaining process." App. 34a. But this runs afoul of *Fort Halifax*, where the Court was careful to point out that the Massachusetts statute in *Metropolitan Life* "permitted] *no* collective bargaining" but nevertheless "escaped] NLRA pre-emotion." 482 U.S. at 22 (emphasis in orig-final).

6. Finally, the court below claimed that preemption was necessary because the Amendment "interfered]" with the terms of respondent's expired collective bargaining agreement, App. 43a, both because its cause of action for retaliation was inconsistent with the

agreement's dispute-resolution mechanism, and because its mandated breaks supposedly undermined the room-cleaning quota system established by the agreement, see App. 40a-43a. But this Court's holdings create no exception based on the happenstance that some set of employees somewhere in the jurisdiction are already subject to a collective bargaining agreement covering the same topic. See *Fort Halifax*, 482 U.S. at 21-22 ("the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emotion, for 'there is nothing in the NLRA * * * which expressly forecloses all state regulatory power with respect to those issues * * * that may be the subject of collective bargaining'") (quoting *Malone*, 435 U.S. at 504-505 (1978) (ellipses in orig-final)).

In fact, such an exception would be nonsensical, for it would effectively preclude unionized employees from benefitting from state labor protections imposing minimum standards on nonunion employers, something the NLRA clearly does not contemplate. See *Lividas*, 512 U.S. at 130 ("Denying represented employees basic safety protections might 'encourage' collective bargain-in over that subject * * *, but we have never suggested that labor law's bias toward bargaining is to be served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course."). Rather, the fact that, in some instances, a

new state law will cause employers and unions to go back to the bargaining table is fully consistent with the NLRA, which envisions bargaining with the various state workplace regulations as a floor or "backdrop." *Metro. Life*, 471 U.S. at 757.

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Thus, for several reasons, the Seventh Circuit's decision is impossible to reconcile with this Court's decisions. Its misapplication of the terms "law of general application" and "minimum labor standard" threaten added confusion in this important area of federal-state relations. Worse, the decision calls into question numerous state and local workplace standards already on the books, see *infra* pp. 35-41, and it is likely to chill legislatures from enacting necessary new ones. This Court's certiorari review is needed to resolve this uncertainty about the States' authority to regulate the workplace and to clarify language used in its previous decisions controlling this area of law.

III. The Issue Presented Is One Of Critical Importance, And The Decision Below Casts Doubt On Many Existing Workplace Protection Laws.

In cases "where federal law is said to bar state action in fields of traditional state regulation," this Court "always" "works] on the assumption that the historic police powers of the States [are] not to be superceded by [federal law] unless that was the clear and manifest purpose of Congress." *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) (internal quotations and citations omitted); accord *Fort Halifax*, 482 U.S. at 21 ("pre-emotion should not be lightly inferred * * * since the establishment of labor standards falls within the traditional police power of the State"). Not withstanding the Court's conclusion, applying this presumption against preemption, that Congress did not intend the NLRA "to disturb the myriad state laws * * * that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization," *Metro. Life*, 471 U.S. at 756, the decision below calls into question a wide variety of state and local laws regulating the nation's workplaces.

The features of the Amendment on which the Seventh Circuit relied to find preemption are common to many workplace statutes, and the court provided no principled basis to distinguish Illinois's statute from

many such laws. As a result, the Seventh Circuit's decision, if allowed to stand, will encourage litigation over the validity of existing laws and inhibit state and local governments from enacting lawful reforms that their citizens favor. It also will require state legislated-urea to forego sensible targeting of workplace regular-tigons to those employees most in need of certain protections or those employers most able to bear the additional cost of compliance. Instead, state legislatures will be forced to craft "one-size-fits-all" regulations rather than risk costly litigation and the possibility of judicial invalidation.

Workplace legislation always has targeted particular occupations and locales. See, *e.g.*, *Holden v. Hardy*, 169 U.S. 366, 389-390 (1898) (upholding work hours law covering only mine workers). Indeed, many modern state workplace safety laws establish special protec-tigons for particular occupations and indus-tries—typically, as occurred here, in response to identified conditions peculiar to those jobs. See App. 86a-87a (noting unique workplace stresses on hotel room attendants as result of "quota system" and increased work intensity). On the precise issue here—rest and meal breaks—many States have requirements that vary by job description, reflecting differences in the need for and feasibility of taking breaks. See, *e.g.*, 7 Colo. Code Regs. § 1103-1(8) (employees in four industries—retail and trade,

commercial and support service, food and beverage, and health and medical—must receive a paid ten-minute rest break for each four-hour work period and a thirty-minute meal break after five hours); Neb. Rev. Stat. § 48-212 (2008) (employees in assembly plants, workshops, and other mechanical establishments must receive thirty-minute meal break during each eight-hour shift and be allowed to leave the premises during this break); N.Y. Lab. Law § 162 (McKinney 2009) (mandating thirty-minute meal break for most employees whose shifts exceed six hours, but requiring sixty-minute meal break for factory workers); 43 Pa. Cons. Stat. Ann. § 1301.207(c) (West 2009) (seasonal farm workers may not work more than five hours without meal or rest period); Wis. Stat. Ann. § 103.85(2) (West 2009) (exempting janitors, security personnel, persons involved in the manufacture or distribution of dairy products, and "persons employed in bakeries, flour and feed mills, hotels, and restaurants" from Wisconsin's One Day Rest in Seven Act).

Similarly, protections against mandatory overtime often target particular occupations, like nurses and miners, seen as vulnerable to overwork. See, *e.g.*, 210 Ill. Comp. Stat. 85/10.9(b) (2008) (barring hospitals from requiring nurses to work mandatory overtime); Me. Rev. Stat. Ann. tit. 26, § 603(5) (2009) (nurses cannot be disciplined for refusing to work overtime, and must be allowed at least ten hours of off-duty time

immediately following twelve or more consecutive hours of worktime); R.I. Gen Laws § 23-17.20-3(b) (2009) (in no case will nurse be required to work longer than twelve hours except when there is an unforeseeable emergency); Wash. Rev. Code § 49.28.140 (West 2009) (nurses may not be required to work overtime); W. Va. Code Ann. § 21-5F-3 (West 2009) (no nurse may be forced to work overtime except in cases where patient's safety is at risk); Alaska Stat. § 23.10.410 (2009) (with certain exceptions, miner may not be employed in underground mine or work more than ten hours in twenty-four hours); Colo. Rev. Stat. Ann. § 8-13-102 (West 2009) (mine workers may be forced to work more than eight hours only if there is written work plan outlining conditions under which longer workday would be permitted and employees are given reasonable notice of proposed increase in work schedule); Mo. Ann. Stat. § 290.020 (West 2009) (mining employees may not be required to work longer than eight hours).

It is likewise common for state standards to apply differently in different geographic locations. Generally, such measures provide heightened protections for workers in urban areas, in light of higher costs of living or different industry or economic conditions, as was true here. See App. 94a-95a (Amendment "protect[s] hotel room attendants from overwork in the jurisdiction where the majority of such employees would be impacted and in the jurisdiction best positioned to

absorb the costs of [the] new regulations."). The prototypical example is prevailing wage statutes, long used by States to establish minimum pay for public projects on a county-by-county (as well as trade-by-trade) basis, with higher rates for workers in urban than rural areas. See, *e.g.*, 820 Ill. Comp. Stat. 130/1, 2 (2008) (setting prevailing wage as prevailing hourly rate including fringe benefits for work of similar character in same locality); accord Ind. Code Ann. § 5-16-7-1 (West 2009); Tenn. Code Ann. § 12-4-405 (West 2009); Tex. Gov't Code Ann. § 2258.021(a)(1) (2009); Wis. Stat. Ann. § 103.49(d)(1) (West 2009).[7] Local ordinances also routinely provide different substantive workplace rules. See, *e.g.*, http://www.no-smoke.org/pdf/100ordlisttabs.pdf (last visited Jun. 26, 2009) (chart collecting U.S. local smoke-free workplace ordinances).

In addition, while the Seventh Circuit found fault with the Amendment's anti-retaliation provision, such provisions are routinely used to promote improved compliance in the face of limited enforcement resources. For example, state and local laws often provide for

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[7] More recently, state "living wage" laws have set minimum pay levels by geographic region. See, *e.g.*, Md. Procure. Regs. 21.11.10.01 § (B)(4), (5) (2009), and http://www.dllr.state.md.us/labor/livingwagefaqa.shtml#15 (last visited Jun. 26, 2009) (minimum wage for employees under certain state services contracts is nearly three dollars an hour higher for workers in urban counties).

rebuttable presumptions of retaliation against workers who assert their rights. See, *e.g.*, Ariz. Rev. Stat. Ann. § 23-364(B) (2009) (adverse action within ninety days of assertion of minimum wage law rights "raise[s] a presumption that such action was retaliation, which may be rebutted by clear and convincing evidence that such action was taken for other permissible reasons"); N.J. Stat. Ann. § 34:20-9 (West 2009) (rebuttable presumption arises upon adverse action within ninety days of asserting rights under law protecting against independent contractor classification in construction); San Diego, Cal., Municipal Code § 22.4230 (2005) (same for adverse action within ninety days of providing information toward or cooperating in compliance investigation); Santa Fe, N.M., Municipal Ordinance 28-1.6(B) (same for adverse action within sixty days of asserting or communicating information regarding rights); S.F., Cal., Admin. Code § 12W.7 (same for adverse action within ninety days of filing complaint, cooperating with investigation, opposing any unlawful practice, or informing person of rights).

Likewise, while the Seventh Circuit held that the Amendment's treble damages provision "can in no sense be considered 'minimal,'" App. 37a, many States require treble damages or similarly substantial penalties to secure compliance with their minimum wage and workplace safety laws. See, *e.g.*, Ariz. Rev. Stat. Ann. § 23-364(G) (2009) (requiring mandatory treble

damages for mini-mum wage violations plus daily penalties for retaliation against workers seeking to enforce their rights); Ohio Const. Art. II, § 34a (same); Mass. Gen. Laws. Ann. ch. 149, § 27 (West 2008) (treble damages for minimum wage violations); Wis. Stat. Ann. § 103.96(2) (West 2008) (triple backpay for willful violations of anti-retaliation provisions under migrant worker protection law).

* * *

The ruling below calls into question these and other substantive state and local laws governing the workplace. This Court's intervention thus is essential to resolve the lower courts' uncertainty over the scope of the States' police power in this critical area of state regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2009

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-3377

520 SOUTH MICHIGAN AVENUE ASSOCIATES, LTD., d/b/a THE CONGRESS PLAZA HOTEL & CONVENTION CENTER, *Plaintiff-Appellant*,

v.

CATHERINE SHANNON, Director of the Illinois Department of Labor, *Defendant-Appellee*, and UNITE HERE LOCAL 1, *Intervenor-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 4552 — **Joan Humphrey Lefkow**, *Judge*.

Argued Feb. 19, 2008.

Decided Dec. 15, 2008.

Rehearing En Banc Denied Jan. 28, 2009

Before *MANION*, *KANE*, and *TINDER*, *Circuit Judges*.

MANION, *Circuit Judge*. 520 S. Michigan Avenue Associates, Ltd., doing business as The Congress Plaza Hotel & Convention Center ("Congress

Plaza"), sued the Director of the Illinois Department of Labor ("Illinois"), seeking a declaratory judgment that Illinois statute 820 ILCS 140/3.1, the Hotel Room Attendant Amendment ("Attendant Amendment") to the One Day Rest in Seven Act, 820 ILCS 140/1 *et seq.*, is unconstitutional. Unite Here Local 1, a labor union, intervened and together with Illinois moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). The district court granted the defendant's and intervenor's motions to dismiss, rejecting Congress Plaza's arguments that the Attendant Amendment was preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, and violated its due process and equal protection rights. Congress Plaza appeals. Because the Attendant Amendment is preempted by the NLRA, we reverse.

I.

Congress Plaza is located on Michigan Avenue in Chicago, Illinois, in Cook County. Congress Plaza, employs, among others, room attendants who clean guest rooms. The Unite Here Local 1 union ("Unite Here") represents the approximately 130 room attendants working at Congress Plaza, as well as several hundred room attendants working at other Cook County hotels. As of the date of oral argument, Congress Plaza and Unite Here's latest collective bargaining agreement ("CBA") had expired on December 31, 2002. Since June 2003, Unite Here members have engaged in a work stoppage while negotiating a new CBA. Congress Plaza has continued to abide by the terms of

the expired CBA, requiring a work day of eight productive hours and providing meals free of charge to its room attendants, along with clean and sanitary facilities. Congress Plaza also customarily provides one half-hour unpaid lunch break.

In the midst of Congress Plaza's negotiations with Unite Here, the Illinois legislature passed the Hotel Room Attendant Amendment ("Attendant Amendment") to the One Day Rest in Seven Act. The One Day Rest in Seven Act was originally enacted in July 1935 and currently provides that "[e]very employer shall allow every employee except those specified in this Section at least twenty-four consecutive hours of rest in every calendar week in addition to the regular period of rest allowed at the close of each working day."[1] 820

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[1] Under current law, Illinois exempts seven categories of employees from the mandated rest day: "(1) Part-time employees whose total work hours for one employer during a calendar week do not exceed 20; and (2) Employees needed in case of breakdown of machinery or equipment or other emergency requiring the immediate services of experienced and competent labor to prevent injury to person, damage to property, or suspension of necessary operation; and (3) Employees employed in agriculture or coal mining; and (4) Employees engaged in the occupation of canning and processing perishable agricultural products, if such employees are employed by an employer in such occupation on a seasonal basis and for not more than 20 weeks during any calendar year or 12 month period; and (5) Employees employed as watchmen or

(continued...)

ILCS 140/2. The One Day Rest in Seven Act further provides: "Every employer shall permit its employees who are to work for 7 1/2 continuous hours or longer, except those specified in this Section, at least 20 minutes for a meal period beginning no later than 5 hours after the start of the work period."[2] 820 ILCS 140/3. The section mandating a 20-minute meal period "does not apply to employees for whom meal periods are established through the collective bargaining process." *Id.*

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[1] (...continued)
security guards; and (6) Employees who are employed in a bonafide executive, administrative, or professional capacity or in the capacity of an outside salesman, as defined in Section 12(a)(1) of the federal Fair Labor Standards Act, as amended, and those employed as supervisors as defined in Section 2(11) of the National Labor Relations Act, as amended; and (7) Employees who are employed as crew members of any uninspected towing vessel, as defined by Section 2101(40) of Title 46 of the United States Code, operating in any navigable waters in or along the boundaries of the State of Illinois." 820 ILCS 140/2.

[2] "This Section does not apply to employees who monitor individuals with developmental disabilities or mental illness, or both, and who, in the course of those duties, are required to be on call during an entire 8 hour work period; however, those employees shall be allowed to eat a meal during the 8 hour work period while continuing to monitor those individuals." 820 ILCS 140/3.

The Attendant Amendment to the One Day Rest in Seven Act provides, in full:

> § 3.1. Hotel room attendants.
>
> (a) As used in this Section, "hotel room attendant" means a person who cleans or puts in order guest rooms in a hotel or other establishment licensed for transient occupancy.
>
> (b) This Section applies only to hotels and other establishments licensed for transient occupancy that are located in a county with a population greater than 3,000,000.[3]
>
> (c) Notwithstanding any other provision of law, every hotel room attendant shall receive a minimum of two 15-minute paid rest breaks and one 30-minute meal period in each workday on which the hotel room attendant works at least 7 hours. An employer may not require any hotel room attendant to work during a break period.

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[3] Only one county out of the 102 counties in Illinois — Cook County — has a population of more than three million people. As of the 2000 census, Cook County's population was 5,376,741. *See* http://illinoisgis.ito.state.il.us /census2000/county_census.asp?ct=P0010001 (last visited August 15, 2008). DuPage County has the next highest population base, but as of 2000, not even one million people resided there. *Id.*

(d) Every employer of hotel room attendants shall make available at all times a room on the employer's premises with adequate seating and tables for the purpose of allowing hotel room attendants to enjoy break periods in a clean and comfortable environment. The room shall have clean drinking water provided without charge.

(e) Each employer of hotel room attendants shall keep a complete and accurate record of the break periods of its hotel room attendants.

(f) An employer who violates this Section shall pay to the hotel room attendant 3 times the hotel room attendant's regular hourly rate of pay for each workday during which the required breaks were not provided.

(g) It is unlawful for any employer or an employer's agent or representative to take any action against any person in retaliation for the exercise of rights under this Section. In any civil proceeding brought under this subsection (f), if the plaintiff establishes that he or she was employed by the defendant, exercised rights under this Section, or alleged in good faith that the defendant was not complying with this Section, and was thereafter terminated, demoted, or otherwise penalized by the defendant, then a rebuttable

> presumption shall arise that the defendant's action was taken in retaliation for the exercise of rights established by this Section. To rebut the presumption, the defendant must prove that the sole reason for the termination, demotion, or penalty was a legitimate business reason.
>
> (h) In addition to the remedies provided in Sections 6 and 7, a person claiming violation of this Section shall be entitled to all remedies available under law or in equity, including but not limited to damages, back pay, reinstatement, or injunctive relief. Any person terminated in violation of this Section shall recover treble his or her lost normal daily compensation and fringe benefits, together with interest thereon, and any consequential damages suffered by the employee. The court shall award reasonable attorney's fees and costs to a prevailing plaintiff in an enforcement action under this Section.

820 ILCS 140/3.1.

After the Illinois legislature passed the Attendant Amendment and the governor signed it into law, the Illinois Hotel and Lodging Association filed a declaratory judgment action in state court against the Director of the Illinois Department of Labor, seeking to have the Attendant Amendment declared unconstitutional. The state trial court granted the Illinois

Department of Labor summary judgment, concluding that the Attendant Amendment was not preempted, and that the Attendant Amendment did not violate the Illinois Constitution's prohibition on special legislation or the plaintiff's right to equal protection. *Ill. Hotel & Lodging Ass'n v. Ludwig*, No. 05CH13796, *10 (Circuit Court of Cook County, Illinois). The Illinois appellate court affirmed. *See Ill. Hotel & Lodging Ass'n v. Ludwig*, 869 N.E.2d 846 (Ill. App. Ct. 1st Dist. 2007). The Supreme Court of Illinois declined to hear the Illinois Hotel and Lodging Association's appeal. *Ill. Hotel & Lodging Ass'n v. Ludwig*, 875 N.E.2d 1111 (Ill. 2007).

While the Illinois Hotel and Lodging Association's case was making its way through the Illinois state court system, Congress Plaza, which is not a member of that trade organization, filed its own challenge to the Attendant Amendment in federal court. Congress Plaza argued that the Attendant Amendment is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, and section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). Congress Plaza also alleged that the Attendant Amendment violated its due process and equal protection rights, as well as provisions of the Illinois Constitution. Congress Plaza sought a permanent injunction prohibiting enforcement of the Attendant Amendment.

Illinois and Unite Here filed separate motions to dismiss under Fed.R.Civ.P. 12(b)(6). Illinois also filed

a motion to dismiss under Fed.R.Civ.P. 12(b)(1), claiming Eleventh Amendment immunity from the state claims. The district court granted the defendants' motions to dismiss Congress Plaza's preemption and equal protection and due process claims. *520 S. Michigan Ave. Assoc., Ltd. v. Shannon*, 2007 WL 2728757 at *8-11 (N.D.Ill. 2007). The district court then declined jurisdiction over Congress Plaza's state law claims. *Id.* at *11. Congress Plaza appeals.

II.

On appeal, Congress Plaza argues that the NLRA preempts the Attendant Amendment.[4] Whether the NLRA preempts the Attendant Amendment is a pure legal question and therefore we review the district court's decision de novo. *See Cannon v. Edgar*, 33 F.3d 880, 883 (7th Cir. 1994). Moreover, our de novo review

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[4] Congress Plaza does not pursue its §301 LMRA preemption claim on appeal. Moreover, while Congress Plaza states in its Statement of the Case that it "also claims the amendment violates the special legislation provision of the Illinois Constitution and constitutes an arbitrary legislative classification," Appellant Br. at 2, it does not present these claims in its Issues Presented For Review. Congress Plaza also does not make any argument in support of its state law claims. Accordingly, Congress Plaza has waived any argument based on state law. *See Hildebrandt v. Ill. Dep't of Natural Res.*, 347 F.3d 1014, 1025 n.6 (7th Cir. 2003) (holding that when a party presents no argument in its brief with respect to a particular claim, any arguments with respect to that claim are waived).

is not limited by the state court's decision in *Ill. Hotel & Lodging Ass'n v. Ludwig*, 869 N.E.2d 846, holding that the Attendant Amendment is not preempted by the NLRA. We "owe[ ] no deference to state-court interpretation of the United States Constitution." *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1181 (10th Cir. 2007) (citing *Ace Cycle World, Inc. v. Am. Honda Motor Co.*, 788 F.2d 1225, 1228 (7th Cir. 1986)).[5]

Our review of preemption begins with the Constitution's Supremacy Clause. *See Cannon*, 33 F.3d at 883. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges

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[5] When the question of federal preemption of state law is at issue, state and federal courts, perhaps not surprisingly, may reach starkly divergent views on the United States Constitution, as illustrated most clearly in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). In *Geier*, the Supreme Court held that a state tort claim against Honda for failing to provide a driver's side air bag was preempted by a federal regulation. Prior to the Supreme Court's ruling, every federal circuit which considered the issue had held that the state law was preempted, while state courts uniformly held to the contrary — that federal law did not preempt state law. *Geier*, 529 U.S. at 866.

> in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Thus, under Article VI of the Constitution, federal law is the "supreme Law of the Land," and "it preempts state laws that 'interfere with, or are contrary to, federal law.'" *Boomer v. AT & T Corp.*, 309 F.3d 404, 417 (7th Cir. 2002) (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985)).

In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Supreme Court summarized the task courts face when confronted with the issue of preemption, stating:

> In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue. Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Id. at 738 (internal quotations omitted).

As the Supreme Court recently explained in *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008), "the NLRA itself contains no express preemption provision." *Id.* at 2412. Thus, the issue facing us is one of implied preemption. With implied preemption, a state

law should be sustained "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Malone v. White Motor Corp.*, 435 U.S. 497 (1978). Further, in the context of the NLRA, a state law is preempted by implication if it conflicts with the underlying goals and policies of the NLRA or stands "as an obstacle to the accomplishment and execution of the full purposes and objectives" of Congress. *Livadas v. Bradshaw*, 512 U.S. 107, 120 (internal quotation omitted).

From these general preemption principles, the Supreme Court has developed two relevant NLRA preemption doctrines: *Garmon* preemption and *Machinists* preemption. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).[6] The first doctrine, *Garmon* preemption, seeks to prevent conflicts between state and local regulation and Congress's integrated scheme of regulation embodied in Sections 7 and 8 of the NLRA. *Garmon*,

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[6] A third preemption doctrine, based on § 301 of the LMRA, "pre-empts state law only insofar as resolution of the state-law claim requires the interpretation of a collective-bargaining agreement . . . ." *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 410 n. 8 (1988). Congress Plaza argued to the district court that § 301 preempts the Attendant Amendment, but as noted above, it does not pursue that argument on appeal.

359 U.S. at 244-45. *Garmon* preemption further seeks to protect the NLRB's primary jurisdiction in cases involving sections 7 and 8 of the NLRA. *Id.* *See also Livadas v. Bradshaw*, 512 U.S. 107, 117, n. 11 (1994).

The second relevant NLRA preemption doctrine is *Machinists* preemption. *See Machinists v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976). As the Supreme Court explained in *Metropolitan Life*, 471 U.S. 724, this "second pre-emption doctrine protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated." *Id.* at 749. This preemption doctrine governs "preemption questions that arose concerning activity that was neither arguably protected against employer interference by §§ 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by § 8(b) of that Act. 29 U.S.C. § 157, 158(a)(1) and (b)." *Id.* Thus, in *Machinists*, the Court held "that a State may not penalize a concerted refusal to work overtime that was neither prohibited nor protected under the NLRA, for 'Congress intended that the conduct involved be unregulated because [it] left [the conduct]' to be controlled by the free play of economic forces." *Metropolitan Life*, 471 U.S. at 750 (quoting *Machinists*, 427 U.S. at 140, 96 S. Ct. 2548). While initially, *Machinists* preemption sought "to determine whether certain weapons of bargaining neither protected by § 7 nor forbidden by § 8(b) could be subject to state regulation, [i]t has been used more recently to deter-

mine the validity of state rules of general application that affect the right to bargain or to self-organization." *Metropolitan Life*, 471 U.S. at 749 n. 27 (internal citations omitted). As the Supreme Court recently explained in *Brown*, "*Machinists* preemption is based on the premise that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Brown*, 128 S. Ct. at 2412 (internal quotations omitted). We also elaborated on the concept of *Machinists* preemption in *Cannon*, explaining that this doctrine "prohibits state and municipal regulations of areas that Congress left to the free play of economic forces." *Cannon*, 33 F.3d at 885 (internal quotations and citations omitted).

Congress Plaza argues that the Attendant Amendment is preempted by both *Machinists* preemption and *Garmon* preemption. At oral argument, though, in response to our query, Congress Plaza acknowledged that it believes *Machinists* preemption the stronger of the two arguments. We agree. *See Metropolitan Life*, 471 U.S. at 751 (considering whether a state law establishing minimal mental health benefits in insurance plans was preempted by the NLRA and stating that "[a]ll parties correctly understand this case to involve *Machinists* pre-emption"). Therefore, we begin with Congress Plaza's argument that *Machinists* preempts the Attendant Amendment.

Congress Plaza argues *Machinists* preempts the Attendant Amendment because the Attendant Amendment "intrudes on the parties' collective bargaining process" and alters the "free play of economic forces." In response, Illinois and Unite Here (herein-after collectively "appellees") argue that the Attendant Amendment is a minimum labor standard and as such is not preempted by the NLRA, citing *Metropolitan Life*, 471 U.S. 724 and *Fort Halifax*, 482 U.S. 1.

In *Metropolitan Life*, 471 U.S. 724, two insurance companies ("appellants"), which issued group-health insurance policies in Massachusetts, argued that a Massachusetts statute requiring "any general health-insurance policy that provides hospital and surgical coverage, or any benefit plan that has such coverage, to provide as well a certain minimum of mental-health protection," was preempted by ERISA and the NLRA. *Id.* at 730. The appellants in *Metropolitan Life* argued that "[b]ecause welfare benefits are a mandatory subject of bargaining under the labor law, . . . the NLRA pre-empts any state attempt to impose minimum-benefit terms on the parties." *Id.* at 751-52.

The Supreme Court rejected this argument, concluding that "[t]he evil Congress was addressing [with the NLRA] . . . was entirely unrelated to local or federal regulation establishing minimum terms of employment." *Id.* at 754. Accordingly, the Court held that "[n]o incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power,

and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA." *Id.* at 754-55. The Court further expounded on the meaning of minimum state labor standards, stating they "affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act." *Id.* at 755. "Most significantly," continued the Court, there was "no suggestion in the legislative history of the [NLRA] that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." *Id.* at 756. Rather, the Court "believe[d] that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety." *Id.* The Supreme Court added:

> Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purpose of the federal Act. Thus the Court has recognized that it cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelation-

> ship between employees, employers, and unions; obviously, much of this is left to the States. When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act.

Id. at 756-57 (internal quotation omitted).

The Supreme Court then applied the aforementioned principles to the case at hand and held:

> Massachusetts' mandated-benefit law is an insurance regulation designed to implement the Commonwealth's policy on mental-health care, and as such is a valid and unexceptional exercise of the Commonwealth's police power. It was designed in part to ensure that the less wealthy residents of the Commonwealth would be provided adequate mental-health treatment should they require it. Though [the insurance statute], like many laws affecting terms of employment, potentially limits an employee's right to choose one thing by requiring that he be provided with something else, it does not limit the rights of self-organization or collective bargaining protected by the NLRA, and is not pre-empted by the Act.

Id. at 758. Accordingly, the Supreme Court held that Massachusetts' mandated-benefit law is not preempted by the NLRA. *Id.*

Just two years later, in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), the Supreme Court again addressed the issue of the relationship between "minimum labor standards" and preemption. In *Fort Halifax*, an employer challenged a Maine statute requiring employers to provide severance pay to certain employees. *Id.* at 5. Employees qualified if their employers laid off 100 or more employees, or relocated more than 100 miles away, so long as the employee had worked at the plant at least three years. *Id.* Severance pay was not required if the employee accepted employment at the new plant location or if a contract with the employee addressed the issue of severance pay. *Id.* Fort Halifax argued the state law was preempted because, while it did not directly regulate economic activity, it indirectly undercut the collective bargaining process. *Id.* at 20. The Supreme Court first noted that it had rejected in *Metropolitan Life* the argument "that a State's establishment of minimum substantive labor standards undercuts collective bargaining . . . ." *Id.* at 20. The Court then explained its holding in *Metropolitan Life* noting, among other things "that the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining." *Id.*

After the Court in *Fort Halifax* further explained *Metropolitan Life*, the Court stated that

> [i]t is true that the Maine statute gives employees something for which they otherwise might

> have to barg[illegible]n. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a "backdrop" for their negotiations.

Id. at 21. The Court rejected the claim of preemption, stating "the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for there is nothing in the NLRA . . . which expressly forecloses all state regulatory powers with respect to those issues . . . that may be the subject of collective bargaining." *Id.* at 21-22 (internal quotation omitted).

The Supreme Court in *Fort Halifax* concluded that the Maine statute "is not pre-empted by the NLRA, since its establishment of a minimum labor standard does not impermissibly intrude upon the collective-bargaining process." *Id.* at 23.

The Supreme Court's decisions in *Metropolitan Life* and *Fort Halifax* stand for several propositions. First, the NLRA is concerned primarily with establishing an equitable process for bargaining, and not the substantive terms of bargaining. *Fort Halifax*, 482 U.S. at 20; *Metropolitan Life*, 471 U.S. at 753-54. Second, a state law is not preempted by the NLRA merely because it regulates a mandatory subject of bargaining. *Fort Halifax*, 482 U.S. at 21; *Metropolitan Life*, 471 U.S. at 757. And third, the NLRA does not preempt a state law

which "establishes a minimum labor standard that does not intrude upon the collective-bargaining process." *Fort Halifax*, 482 U.S. at 7; *see also Metropolitan Life*, 471 U.S. at 754-55 ("No incompatibility exists, therefore, because federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.").

Against this backdrop, then, we return to the parties' arguments. As noted above, Congress Plaza claims that the Attendant Amendment is preempted by *Machinists* because it "intrudes on the parties' collective bargaining process" and alters the "free play of economic forces." In response, based on *Metropolitan Life* and *Fort Halifax*, appellees claim that the Attendant Amendment is a minimum labor standard and is thus not preempted. Congress Plaza rejects this characterization of the Attendant Amendment (as a minimum labor standard), relying on this court's decision in *Cannon*.

In *Cannon*, a gravediggers' union, a union member, and union leaders sued the State of Illinois, claiming that the Burial Rights Act was preempted by the NLRA and therefore violated the Supremacy Clause of the Constitution. *Cannon*, 33 F.3d at 881. The Burial Rights Act required cemeteries' management and labor

unions to agree to establish a pool of workers who would provide religiously required interments during a labor dispute. *Id.* at 882. Additionally, the Burial Rights Act provided that "[t]he failure of a cemetery authority or a labor union to negotiate in good faith to establish a pool of workers as provided [in the Act] constitutes a willful violation of this Section," in which case the court shall "grant appropriate relief, including . . . an award of attorney's fees and the imposition of a fine not to exceed $1,000 for each interment which is found to have been delayed in violation of this Section." *Id.* at 882 n.1 (quoting 820 ILCS 135/2.1). After setting forth the governing law, this court held that the Burial Rights Act was preempted by both *Garmon* preemption and *Machinists* preemption. *Id.* at 885. We explained that "the Burial Rights Act is a direct intrusion by the state into the collective bargaining process. The Burial Rights Act purports to regulate a particular term of the bargaining process — that of a pool of workers — and, further requires the parties to actually agree on a particular pool of workers or face sanctions at the hands of the Illinois courts." *Id.* at 884. The court in *Cannon* held "the NLRA does not tolerate this kind of invasion by a state into the collective bargaining process. . . ." *Id.* *Cannon* further held that the Burial Rights Act was preempted by *Machinists*, because it "intrude[d] on the collective bargaining process in a variety of ways; it orders the parties to negotiate as to a specific substantive condition — that of a pool of workers to perform interments during labor disputes. And, more

invasive, the Burial Rights Act orders the parties to agree on a pool of workers, or face sanctions for a failure to do so." *Id.* at 885.

Appellees argue in response that *Cannon* is distinguishable because the statute at issue in *Cannon*, the Burial Rights Act, required the parties to bargain collectively over the issue of a pool of workers, whereas the Attendant Amendment does not mandate bargaining, but instead establishes a minimum labor standard which does not interfere with the collective bargaining process. However, this is a distinction without a difference. As the Supreme Court recently explained, "[i]n NLRA pre-emption cases, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *Brown*, 128 S. Ct. at 2414 (internal quotations omitted). What a state cannot do directly, it also cannot do indirectly. *Id.* at 2415.

The question then is whether the Attendant Amendment establishes a minimum labor standard that does not interfere with collective bargaining. If so, then the regulation (direct or indirect) is permissible. To address whether the Attendant Amendment establishes a minimum labor standard, we turn again to the Supreme Court. Unfortunately, though, the Supreme Court's guidance is sparse. In *Metropolitan Life*, the Court merely noted that minimum labor standards "affect union and nonunion employees equally, and

neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." 471 U.S. at 755. The Court added that minimum labor standards have only "the most indirect effect on the right of self-organization established in the Act . . . [and] are not laws designed to encourage or discourage employees in the promotion of their interests collectively . . . ." *Id.* (quoting *Barrentine*, 450 U.S. at 739 (emphasis in the original)).

While the Attendant Amendment facially affects union and nonunion employees equally, for several reasons we conclude that it does not constitute a genuine minimum labor standard. First, unlike the statutes at issue in *Metropolitan Life* and *Fort Halifax*, the Attendant Amendment is not a statute of general application. In *Metropolitan Life*, the state law at issue did not regulate employment, but rather regulated insurance policies and it applied to all "general health-insurance polic[ies]" and "any benefit plans." *Metropolitan Life*, 471 U.S. at 730. Significantly, in *Metropolitan Life*, the Court characterized the law as one of general application, stating: "Congress apparently did not consider the question of whether state laws of *general application* affecting terms of collective-bargaining agreements subject to mandatory bargaining were to be preempted." *Id.* at 753 (emphasis added). *See also Livadas*, 512 U.S. at 123 n.17 (stating that "Congress is understood to have legislated against a backdrop of generally applicable [state] labor standards"). In *Fort Halifax*, the state's severance statute

applied to all employers who laid off 100 or more employees (or relocated 100 or more miles away). *Fort Halifax*, 482 U.S. at 5. While not universal in application (since it only applied to larger layoffs or distant relocations), the statute still had a very broad application. *See, e.g., Carpenters Local Union No. 26 v. U.S. Fidelity & Guar. Co.*, 215 F.3d 136, 145 (1st Cir. 2000) (stating, in the context of ERISA preemption, that a law of general application "applies to a sufficiently broad, sufficiently generalized universe of situations").

Other circuits likewise characterize "minimum labor standards" as laws of general application. *See Chamber of Commerce v. Bragdon*, 64 F.3d 497, 503 (9th Cir. 1995) ("This is also not the type of regulation of general application that assures that certain coverage provisions be included in all health insurance contracts, such as in *Metropolitan Life*; nor is it the type of regulation seeking to alleviate a particular hardship such as plant closings that affect the employees and the community."); *Barnes v. Stone Container Corp.*, 942 F.2d 689, 692 (9th Cir. 1991) ("The Supreme Court has upheld state statutes which, although they affect employees covered by collective bargaining agreements, are statutes of *general applicability* and do not primarily 'regulate relations between employees, their union, and their employer.' ") (emphasis in original) (quoting *New York Tel. Co. v. New York State Dep't. of Labor*, 440 U.S. 519, 533 (1979)); *Hull v. Dutton*, 935 F.2d 1194, 1198 (11th Cir. 1991) (holding that Alabama's longevity pay statute is not a "minimum labor standard" in part

because the "statute applies only to its own employees and not to its citizens generally"). The Attendant Amendment, however, does not have the general applicability seen in these cases. Rather, it applies to only one occupation (room attendants), in one industry (the hotel industry), in one county (Cook county).[7] These limitations distinguish the Attendant Amendment materially from the statutes of general application considered in *Metropolitan Life* and *Fort Halifax*.

The appellees argue that minimum labor standards that apply only to particular occupations, industries or categories of employers have survived preemption challenge, citing a series of cases. *See* Appellee Br. at 20-21 citing among others, *Fort Halifax*, 482 U.S. at 5 (plant closing law that applied to layoffs with 100 or more employees not preempted); *Dillingham v. Sonoma County*, 190 F.3d 1034, 1041 (9th Cir. 1999) (minimum standards that applied only to apprentices in skilled construction trades not preempted); *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 485, 490 (9th Cir. 1996) (overtime regulation applying only to miners not preempted); *Nat. Broadcasting Co. v. Bradshaw*, 70 F.3d 69, 71-72 (9th Cir. 1995) (California regulation applying only to broadcast employees not

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[7] The statute by its terms applies to any county with a population of three million or more, but as noted above, out of 102 counties, only Cook county has the requisite number of residents.

preempted); and *Wash. Serv. Contractors Coalition v. District of Columbia*, 54 F.3d 811, 819 (D.C.Cir. 1995).[8] The appellees further rely on the Ninth Circuit's decision in *Associated Builders & Contractors of So. Cal., Inc. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004), wherein the court stated that "state substantive labor standards, including minimum wages, are not invalid simply because they apply to particular trades, professions, or job classifications rather than the entire labor market."

Unlike these cases, though, the Attendant Amendment is not just limited by trade — it is also limited by location; the Attendant Amendment is a state statute that applies only in one county in Illinois — Cook county. That fact distinguishes this case from the series of cases cited by Appellees, including *Nunn*; the Attendant Amendment is not just limited to a particular trade, profession, or job classification; it is also a state statute limited to only one of Illinois' 102 counties.

Moreover, we find the Ninth Circuit's decision in *Bragdon* better reasoned. In *Bragdon*, 64 F.3d 497, the Chamber of Commerce sued a California county and

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[8] Appellees noted parenthetically that *Washington Serv. Contractors*, 54 F.3d 811, held a "local ordinance applying only to janitorial contractors not preempted." Appellee Br. at 21. Contrary to Appellees' assertion, however, the statute at issue in *Washington Serv. Contractors*, 54 F.3d 811 was not limited to janitorial contractors, but applied to persons who performed "food, janitorial, maintenance, or non-professional health care services." *Id.* at 814.

county officials, challenging an ordinance that required employers to pay "prevailing wages" to employees on private construction projects costing over $500,000. *Id.* at 498. The Ordinance stated that its purpose was "to promote safe construction, minimize the risk of accidents on industrial projects, prevent erosion of the wage scale, and alleviate the burden on the County's health and welfare services and law enforcement, caused by low-paid workers." *Id.* The "prevailing wages" were defined by the California Department of Industrial Relations, which determined the "prevailing wage" "by reference to established collective bargaining agreements within the locality." *Id.* at 498-99. More specifically, "[t]he Director uses formulas that average the wages and benefits for each craft pursuant to collective-bargaining agreements applicable in each labor market." *Id.* at 502. Under the Ordinance, construction companies were required to agree to pay the state-determined prevailing wage before the County would issue a building permit. *Id.* at 499. The Chamber of Commerce argued that the Ordinance was pre-empted by the NLRA. *Id.* The county responded that the prevailing wage ordinance was a "minimum labor standard" and as such was not preempted. After explaining general preemption principles, the *Machinists* doctrine, and summarizing the Supreme Court's decisions in *Metropolitan Life* and *Fort Halifax*, the Ninth Circuit held that the Ordinance establishing the prevailing wage for construction workers was pre-empted by *Machinists*. *Id.* at 504. In so holding, the Ninth Circuit

concluded that the ordinance was "also very different from a minimum wage law, applicable to all employees, guaranteeing a minimum hourly rate." *Bragdon*, 64 F.3d at 502 (emphasis added). The *Bragdon* court also stressed that the Ordinance at issue was "much more invasive . . . than the isolated statutory provisions of general application approved in *Metropolitan Life* and *Fort Halifax*." *Id.* The court in *Bragdon* reasoned:

> This is also not the type of regulation of general application that assures that certain coverage provisions be included in all health insurance contracts, such as in *Metropolitan Life*; nor is it the type of regulation seeking to alleviate a particular hardship such as plant closings that affect the employees and the community. This Ordinance, by contrast, sets detailed minimum wage and benefit packages, distinct for each craft involved in certain limited construction projects. This minimum varies from time-to-time as new averages are calculated. The district court noted that unlike the law upheld in *Metropolitan Life*, the Ordinance is more properly characterized as an example of an interest group deal in public-interest clothing.

Id. at 503 (internal quotation omitted).[9]

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[9] While the panel in *Nunn* expressed disagreement with some aspects of its Ninth Circuit colleagues' earlier decision in *Bragdon*, *see Nunn*, 356 F.3d at 990, there were two

(continued...)

Like the *Bragdon* court, we find the lack of general application in the Attendant Amendment significant. In exempting "minimum labor standards" from the preemptive force of the NLRA, *Metropolitan Life* and *Fort Halifax* both involved laws of general application and the Supreme Court has characterized "minimum labor standards" as laws of general application. *Metropolitan Life*, 471 U.S. at 753; *Fort Halifax*, 482 U.S. at 5. The Attendant Amendment's narrow scope distinguishes it from minimum labor standards which are not subject to preemption, and places the Attendant Amendment in the "zone protected and reserved for market freedom." *Brown*, 128 S. Ct. at 2412 (quoting *Building & Constr. Trades Council v. Assoc. Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227 (1993)).

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[9] (...continued)
distinguishing features in *Bragdon* that separated it from *Nunn*. As *Nunn* recognized, "Congress authorized states to establish apprenticeship standards and to regulate the conditions governing the implementation of apprenticeship programs, whether the apprentices were working on public or private projects," and this "differentiates California's apprenticeship regulations from the Contra Costa County ordinance at issue in *Bragdon*." *Nunn*, 356 F.3d at 990-91. The court in *Nunn* further distinguished *Bragdon*, reasoning "[s]econd and equally important, unlike in the case of the Contra Costa County ordinance at issue in *Bragdon*, here contractors may completely avoid the applicability of the California apprenticeship regulations" by not hiring apprentices. *Id.* at 991.

The Attendant Amendment's narrow scope of application also serves as a disincentive to collective bargaining. As the Supreme Court explained in *Metropolitan Life*, a minimum labor standard should "neither encourage nor discourage the collective-bargaining process that are the subject of the NLRA." 471 U.S. at 755. Yet by passing a statute with such a narrow focus (one occupation, in one industry, in one county), there seems to be a disincentive to collective bargaining and instead encouragement for employers or unions[10] to focus on lobbying at the state capital instead of negotiating at the bargaining table.[11]

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[10] Unite Here lobbied for the Attendant Amendment. The appellees argue its lobbying is irrelevant, because "[f]ederal pre-emption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalitions led to its enactment." Appellee Br. at 27 (quoting *Northern Ill. Chapter of Assoc. Builders & Contractors v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005)). We agree that Unite Here's lobbying is irrelevant, but what is relevant is that the law discourages collective bargaining.

[11] The legislative debate shows that several state legislators recognized this incentive. *See, e.g.*, IL S. Tran. 2005 Reg. Sess. No. 44, Senator Roskam ("These folks, if they want to win fair and square, by golly go negotiate. Put it on the table and negotiate. Look one another in the eye and bargain. Say we're not going to do this job unless you give us these fifteen minutes or twenty minutes or have our smoke breaks or take a diet Coke break or whatever you want to do, but we ought not do this."); IL S. Tran. 2005 Reg. Sess. No. 45, Senator Pankau ("The main

(continued...)

The Ninth Circuit explained this phenomenon in *Bragdon*, 64 F.3d 497 (9th Cir. 1995). As noted above, in *Bragdon*, the Ninth Circuit struck an Ordinance estab-lishing a prevailing wage for certain private construc-tion projects. *Id.* at 498. In striking the Ordinance, the Ninth Circuit noted that the same or similar justific-ations for the exercise of police power in one business or industry "could be advanced for most any business or industry." *Id.* at 504. The Ninth Circuit recognized the impact, stating:

> A precedent allowing this interference with the free play of economic forces could be easily applied to other businesses or industries in establishing particular minimum wage and benefit packages. This could redirect efforts of employees not to bargain with employers, but instead, to seek to set minimum wage and benefit packages with political bodies. This could invoke defensive action by employers seeking to obtain caps on wages in various businesses or industries. This could be justified as an exercise of police power on community welfare grounds of lowering construction costs to attract business to the area or

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[11] (...continued)
item in this particular bill is this is a bargainable issue. It has been bargained before. It has been presented many times before this particular labor union. So, why are — if they can't get it in their own negotiations, why are they coming down here to us to put it into law?").

> lowering costs to consumers so as to make products or services more available to the general public. This substitutes the free-play of political forces for the free play of economic forces that was intended by the NLRA.

Id. at 504.

Additionally, while on its face this law applies to union and non-union employees equally, the statute's narrow application equates more to a benefit for a bargaining unit than an individual protection. While not all room attendants in Cook county are unionized, by regulating only one county the state makes it possible to target union-heavy counties (or union-light counties), and thus reward (or punish) union activity. Illinois' approach further allows non-union employees to benefit from the bargaining of the union which took place, not at the bargaining table, but at the legislature. In *Bragdon*, the Ninth Circuit held that *Machinists* preempted an Ordinance which "targets particular workers in a particular industry and is developed and revised from the bargaining of others, affects the bargaining process in a way that is incompatible with the general goals of the NLRA." *Bragdon*, 64 F.3d at 504.

The One Day Rest in Seven Act further shows that the Attendant Amendment is not a true minimum labor standard. As noted above, prior to passage of the Attendant Amendment, the One Day Rest in Seven Act already established a minimum labor standard for

breaks, requiring employers to provide one unpaid twenty-minute meal break, although this mandate did "not apply to employees for whom meal periods are established through the collective bargaining process." 820 ILCS 140/3. That minimum labor standard still applies in Illinois, but the Attendant Amendment sets a higher standard. Illinois argues that there is no reason that it cannot increase the minimum, but that is not what Illinois did. Rather, Illinois retained its minimum labor standard and crafted a higher standard for a specific occupation, in a specific industry, in a specific county. In explaining minimum labor standards, the Supreme Court spoke of the laws as establishing a "backdrop" for their negotiations. *Fort Halifax*, 482 U.S. at 21. The One Day Rest in Seven Act established such a state-wide backdrop, while the Attendant Amendment overrode the local bargaining process by imposing confining requirements on one occupation, in one industry, in one county.

Moreover, the One Day Rest in Seven Act exempts from coverage employees covered by a collective bargaining agreement that provides for break rooms and meal breaks. The Attendant Amendment does not contain a similar exemption. As the Supreme Court explained in *Fort Halifax*, "[t]he fact that the parties are free to devise their own severance pay arrangements . . . strengthens the case that the statute works no intrusion on collective bargaining [because the State] has sought to balance the desirability of a particular substantive labor standard against the right

of self-determination regarding the terms and conditions of employment." *Fort Halifax*, 482 U.S. at 22. While a "statute that permits no collective bar-gaining on a subject [may] escape NLRA preemption," *id.*, when the parties are not free to devise their own arrangement preemption applies because the statute intrudes on the collective bargaining process. That is especially true where a similar statute of general applicability allows for such bargaining, but the narrowly targeted law does not.

Furthermore, the Attendant Amendment does not qualify as a "minimum" labor standard. "Minimum," as used by the Supreme Court, implies a low threshold. In fact, in *Metropolitan Life*, the Supreme Court spoke of a state or federal legislation that imposes "minimal substantive requirements on contract terms negotiated between parties to labor agreements." 471 U.S. at 754. The Supreme Court also spoke of minimum labor standards as forming the backdrop for negotiations, *Fort Halifax*, 482 U.S. at 21, again indicating a low-threshold law which serves as a floor. Our sister circuits have likewise read "minimum labor standard" as a minimal substantive impact on contracts. *See Bragdon*, 64 F.3d at 500 (stating that "[w]hen a state law establishes a minimal employment standard *not inconsistent with the general legislative goals of the NLRA*, it conflicts with none of the purposes of the Act") (emphasis in original); *Hull*, 935 F.2d at 1198 (noting that "[a]lthough the Supreme Court did not define what it considered to be a 'minimum labor

standard,' " such statutes are "valid and unexceptional exercise[s] of the [state's] police power," and a state "longevity pay statute is not such a beast") (internal quotation omitted). The Attendant Amendment is much more than a mere backdrop to negotiations because it establishes terms of employment that would be very difficult for any union to bargain for. Specifically, in addition to the requirement for two paid fifteen-minute breaks and an unpaid thirty-minute lunch break, the Attendant Amendment creates a presumption of retaliation and shifts the burden of proof to the employer.[12]

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[12] Specifically, 820 ILCS 140/3.1(g) provides: "It is unlawful for any employer or an employer's agent or representative to take any action against any person in retaliation for the exercise of rights under this Section. In any civil proceeding brought under this subsection (f), if the plaintiff establishes that he or she was employed by the defendant, exercised rights under this Section, and was thereafter terminated, demoted, or otherwise penalized by the defendant, then a rebuttable presumption shall arise that the defendant's action was taken in retaliation for the exercise of rights established by this Section. To rebut the presumption, the defendant must prove that the sole reason for the termination, demotion, or penalty was a legitimate business reason." Thus, for instance, if a hotel fired a room attendant because the room attendant failed to clean the required daily quota of rooms, but the room attendant alleged that the real reason for his or her termination was that he or she had taken the statutorily mandated breaks, 820 ILCS 140/3.1(g) creates a presumption of retaliation.

(continued...)

See 820 ILCS 140/3.1. We are aware of no law or contract that establishes such a shifting of the burden of proof, nor which requires proof from the employer that the "sole reason," *id.*, for any disciplinary conduct was a legitimate business reason. Moreover, this presumption and the shifting of the burden of proof applies indefinitely; it does not matter how long ago it was that an employee exercised rights under the Attendant Amendment or alleged the employer was not complying with the terms of the Attendant Amendment. Once either occurs the defendant-employer will from then on have the burden of proof.[13]

In addition to shifting the burden of proof to the employer, the Attendant Amendment provides that, along with back pay and reinstatement, an employee terminated in violation of the Attendant Amendment

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[12] (...continued)
The burden of proof would then shift to the hotel to prove that the sole reason for the termination was "a legitimate business reason."

[13] At oral argument, Unite Here's attorney stated that the presumption only applies if the employee is disciplined within ninety days of asserting that his employer is not complying with the terms of the Attendant Amendment. However, following oral argument, United Here's attorney submitted a letter to correct this misstatement, confirming that the Attendant Amendment in fact does not contain any time limitation on the presumption of retaliation, as Congress Plaza's attorney had maintained during oral argument.

"shall recover treble his or her lost normal daily compensation and fringe benefits, together with interest thereon, and any consequential damages suffered by the employee." The Attendant Amendment further mandates the payment of costs and attorney's fees. 820 ILCS 140/3.1(h). These statutory provisions can in no sense be considered "minimal." *Cf. Brown*, 128 S. Ct. at 2410-12, 2416, 2422 (holding that California statute which prohibited employers that received state funds from using the funds "to assist, promote, or deter union organizing," was preempted by *Machinists*, because the "formidable enforcement scheme," including recovery of treble damages, attorney's fees, and costs, "put considerable pressure on an employer either to forgo his free speech right to communicate his views to his employees, or else to refuse the receipt of any state funds") (internal quotation omitted). This is especially true when considered in light of what Illinois considered an appropriate minimum for employers in the remaining 101 counties in the One Day Rest in Seven Act-one unpaid twenty-minute break and no shifting of the burden of proof.

In response, Illinois argues that "minimum" does not imply a low threshold, but merely is whatever "minimum" the State decides is appropriate. This argument clashes with the Supreme Court's terminology, i.e., "*minimal* substantive requirements on contract terms negotiated between parties to labor agreements." *Metropolitan Life*, 471 U.S. at 754-55 (emphasis added). This argument also cannot prevail in

the circumstances of this case where Illinois had adopted one truly minimal requirement of general application, but an exponentially higher mandate for a specific occupation, in a specific industry, in one county.

Illinois also claims that because *Machinists* preemption is concerned with the process and not the substantive terms of the bargain, the substantive requirements of the Attendant Amendment are irrelevant. Illinois is correct that "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Metropolitan Life*, 471 U.S. at 753. However, merely because a state statute establishes a substantive requirement does not mean that it automatically avoids preemption. Rather, to avoid preemption the state's minimum labor standard must not be incompatible with the goals of the NLRA. *See Metropolitan Life*, 471 U.S. at 757; *Fort Halifax*, 482 U.S. at 23.

The more stringent a state labor substantive standard, the more likely it is that the state law interferes with the bargaining process. And as a standard becomes more stringent, the state, at a certain point, effectively substitutes itself as the bargaining representative. As the Ninth Circuit explained in *Bragdon*:

> The Court has also clearly held that a state's requirement of "minimal substantive requirements" on contract terms is not such an interference with the bargaining process as to be preempted. There is no doubt that imposing substantive requirements does affect the bargaining process. Viewed in the extreme, the substantive requirements could be so restricted as to virtually dictate the results of the contract. The objective of allowing the bargaining process "to be controlled by the free-play of economic forces" can be frustrated by the imposition of substantive requirements, as well as by the interference with the use of economic weapons. The question then becomes the extent of the substantive requirements that a state may impose on the bargaining process.

Bragdon, 64 F.3d at 501.

In *Bragdon*, the Ninth Circuit concluded that "the Ordinance [establishing a prevailing wage] affects the bargaining process in a much more invasive and detailed fashion than the isolated statutory provisions of general application approved in *Metropolitan Life* and *Fort Halifax*." *Id.* at 502. The court explained that the Ordinance is

> also very different from a minimum wage law, applicable to all employees, guarantying a minimum hourly rate. This Ordinance provides for specific minimum wages and benefits to be paid

> to each craft and only to those workers who are engaged in the specific construction projects covered by the Ordinance. This is not a wage and benefit package that has been bargained for in any fashion by these construction employers and employees, but rather is a minimum wage and benefit package that is promulgated by the Director of the Department of Industrial Relations of the State of California and that is developed by averaging the bargains struck by other employers and employees.

Id. at 502-03.

Like the Ordinance at issue in *Bragdon*, the Attendant Amendment "affects the bargaining process in a much more invasive and detailed fashion than the isolated statutory provisions of general application approved in *Metropolitan Life* and *Fort Halifax*." *Id.* at 502. As noted above, the Attendant Amendment creates a presumption of retaliation that shifts not the burden of production, but the *burden of proof*. This shifting of the burden of proof applies indefinitely once an employee has either exercised rights under the Attendant Amendment or alleged in good faith that the employer is not complying with the terms of the Attendant Amendment. This stringent measure impacts the ability of an employer to discipline or fire employees, pursuant to the terms of a collective bargaining agreement. Under Congress Plaza's previous CBA, claims of breaches had to proceed through a carefully crafted grievance

procedure and if not resolved, required the parties to submit to arbitration. (CBA at 30-32). By creating a private cause of action for retaliation which shifts the burden of proof to the employer indefinitely, the Attendant Amendment further "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the NLRA. *Livadas*, 512 U.S. at 120 (quoting *Brown v. Hotel Employees*, 468 U.S. 491, 501 (1984)). The NLRA's purposes, as stated in the "Findings and Declaration of Policy" in § 1 of the NLRA, 29 U.S.C. § 151, include, among other things, "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions . . . ." The Attendant Amendment does the exact opposite, encouraging litigation rather than resolution through the mechanism established by the CBA.

Moreover, room attendants are typically paid on an hourly basis, but are required to complete a certain number of rooms within that time. *See Ill. Hotel & Lodging Ass'n v. Ludwig*, 869 N.E.2d at 846, 849 (Ill. App. 2007) ("Hotel room attendants essentially work on a piece-rate system. Both union and nonunion hotels require room attendants to clean a quota of rooms each work shift. Although they are paid by the hour, room attendants are required to deliver a quantified amount of work during their shift and can be disciplined if they

fail to do so.").[14] The Illinois legislature used this as a basis to support the Attendant Amendment, noting during the committee hearings that the quota system impacted "all hotel room attendants' ability to take breaks." *Ill. Hotel & Lodging Ass'n v. Ludwig*, No. 05CH13796, *10 (Circuit Court of Cook County, Illinois 2006) (citing *Hearings on H.B. 3485 Before the House Labor Committee*). Given the pay and work structure of room attendants, mandating breaks affects the structure of the entirety of the employment agreement. To illustrate: Assume that Congress Plaza requires room attendants to clean and service eighteen rooms during each shift. Congress Plaza customarily provided room attendants one unpaid thirty-minute lunch break. Adding another thirty minutes of break-time is likely to prevent room attendants from completing the required eighteen-room quota. After all, if Congress Plaza believed that the average room attendant could clean or service eighteen rooms in less time, it would increase the number of rooms required to be cleaned or decrease

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[14] A court may "take judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies...." *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). Thus, we take judicial notice of the state court decisions. *In re Salem*, 465 F.3d 767, 771 (7th Cir. 2006) ("We begin with New York cases; we take judicial notice of these dockets and opinions."). Moreover, this court may "consider judicially noticed documents without converting a motion to dismiss into a motion for summary judgment." *Menominee Indian*, 161 F.3d at 456.

the shift time. Thus, the Attendant Amendment's mandated breaks not only increase break times, but interfere with the entire quota structure of Congress Plaza's CBA.[15] In fact, it appears from the hearings of the House Labor Committee that the legislature intended to alter the structure of the employment relationship between hotels, like Congress Plaza, and their employees. *See Ill. Hotel & Lodging Ass'n v. Ludwig*, No. 05CH13796 at *10 (Circuit Court of Cook County, Illinois 2006) ("Rather, the concerns expressed by the Legislature focused generally on all hotel room attendants" ability to take breaks in an industry where each individual must clean a quota of rooms per day.") (citing *Hearings on H.B. 3485 Before the House Labor Committee*). As the Supreme Court stated in *Machinists*, "[o]ur decisions . . . have made it abundantly clear that state attempts to influence the substantive terms of collective bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB . . . ." *Machinists*, 427 U.S. at 153.

The Ninth Circuit in *Bragdon* likewise found that a state law that impacted the broader labor agreement was preempted by the NLRA under *Machinists* because

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[15] This interference might be acceptable, if the Attendant Amendment was a law of general application, but because it targets the one specific industry — the very industry which has in place an efficiency standard setting minimal quotas — the Attendant Amendment becomes an interference with the collective bargaining process.

"it affects the bargaining process in a much more invasive and detailed fashion than the isolated statutory provisions of general application approved in *Metropolitan Life* and *Fort Halifax*." *Bragdon*, 64 F.3d at 502. The state law in *Bragdon*, as noted above, set a prevailing wage. The prevailing wage required a minimal amount that wages and benefits must total together, but also set the minimum amount that must be paid in wages. *Id.* As the *Bragdon* court aptly recognized, this ordinance interfered with the collective bargaining process because if the employer had agreed to a total compensation package that exceeded the Ordinance's requirements, but had a wage component lower than that set by the Ordinance, "[t]his would place considerable pressure on the contractor and its employees to revise the labor agreement to reduce the benefit package and increase the hourly wages in order to remain competitive and obtain the contracts and jobs . . . ." *Id.* Likewise, in *Bechtel Construction, Inc. v. United Brotherhood of Carpenters & Joiners of America*, 812 F.2d 1220 (9th Cir. 1987), the Ninth Circuit held that a state law establishing a minimum wage scale for apprentices was not a minimum labor standard, in part because "a set wage for apprentices would have required higher pay for all levels in the trade, in order to maintain the graded wage scale." *Id.* at 1226. Thus, "[t]he right to bargain collectively of one group or another is harmed by the minimum wage for apprentices." The Ninth Circuit further explained that "[u]nlike the minimum benefit standards in *Metro-*

politan, the California requirements do not affect all workers equally, but concern only apprentices." *Id.* In turn, "[t]his accounts for the distorting effect that enforcement of the [wage] Standards could have on the bargaining process." *Id.* Similarly, in this case, the Attendant Amendment affects not just break periods, but interferes with both the dispute-resolution structure of the employment relationship and with the structure of the quota system. This interference further disqualifies the Attendant Amendment from being a minimum labor standard.

In sum, for numerous reasons, we conclude that the Attendant Amendment is not a minimum labor standard and is preempted by the NLRA. First, the Attendant Amendment is not a law of general application. Rather, the Attendant Amendment applies to one occupation, in one industry, in one county. This limited scope of the Attendant Amendment discourages collective bargaining by encouraging lobbying for targeted legislation applicable to the equivalent of a bargaining unit. The Attendant Amendment is further not a true "minimum" labor standard, as demonstrated when the statute's provisions are juxtaposed against the minimal standard of general application currently in effect in Illinois, i.e., one unpaid twenty-minute break, and when considered in light of the formidable enforcement mechanism, including the treble damages and unprecedented shifting of the burden of proof to the employer. The Attendant Amendment further interferes with the objectives of the NLRA by overriding the dispute

resolution mechanisms already in place and by interfering with the pay and quota structure established for room attendants. For all of these reasons,[16] we conclude the Attendant Amendment is preempted by the *Machinists* doctrine. *See Bragdon*, 64 F.3d at 504 ("Furthermore, this type of minimum labor standard enactment, which is not of general application, but targets particular workers in a particular industry and is developed and revised from the bargaining of others, affects the bargaining process in a way that is incompatible with the general goals of the NLRA."). Because the Attendant Amendment is preempted by the *Machinists* doctrine, we need not determine whether *Garmon* preemption would also apply. Likewise, we need not decide whether the Attendant Amendment violates Congress Plaza's equal protection and due process rights. Accordingly, we reverse the judgment of

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[16] Congress Plaza also argues that the Attendant Amendment is preempted because it "unilaterally alters the parties' collective bargaining agreement terms and conditions." Appellant Reply Br. at 1. Congress Plaza believes that a state law which forces Congress Plaza to unilaterally change the terms and conditions of employment during a labor dispute violates federal law because, prior to impasse, the NLRA requires employers to "continue to apply terms of the expired bargaining agreement." Appellant Reply Br. at 3. We disagree. Had the Attendant Amendment truly represented a minimum labor standard that did not interfere with the collective bargaining process, the fact that the State law mandates different terms and conditions than those contained in an expired CBA would be irrelevant.

the district court and remand this case to the district court for proceedings consistent with our ruling.

III.

For the reasons stated above, we conclude that the Attendant Amendment is preempted by the NLRA under the *Machinists* doctrine. We Reverse and Remand for proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

520 S. MICHIGAN AVENUE ASSOCIATES, LTD., d/b/a THE CONGRESS PLAZA HOTEL & CONVENTION CENTER,	)	
Plaintiff,	)	No. 06 C 4552
v.	)	Judge Joan H. Lefkow
CATHERINE SHANNON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF LABOR,[1]	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff 520 S. Michigan Avenue Associates, Ltd., doing business as The Congress Plaza Hotel & Convention Center ("the Hotel"), filed this declaratory judgment action against the Director of the Illinois

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[1] Catherine Shannon has replaced Art Ludwig as the Director of the Illinois Department of Labor. Ms. Shannon has been automatically substituted under Fed. R. Civ. P. 25(d)(1).

Department of Labor ("the Director") seeking a declaration that 820 Ill. Comp. Stat. 140/3.1, the Hotel Room Attendant Amendment ("the Amendment") to the One Day Rest in Seven Act, 820 Ill. Comp. Stat. 140/1 *et seq.*, is unconstitutional. The Hotel alleges that the Amendment violates the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, because it is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq., and section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). The Hotel also claims that the Amendment violates the Hotel's federal constitutional rights to due process and equal protection as well as certain provisions of the Illinois Constitution. It requests a permanent injunction prohibiting enforcement of the Amendment. The court has jurisdiction under 28 U.S.C. §§ 1331, 2201, and 2202 and 42 U.S.C. § 1983.

Unite Here Local 1 ("Unite Here"), a labor union representing hotel room attendants in Cook County, including employees of the Hotel, was granted leave to intervene as a defendant. Dkt. No. 31. Before the court are motions to dismiss filed by the Director and Unite Here (collectively, "the defendants"). Both defendants move to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. The Director also moves to dismiss for lack of subject matter jurisdiction based on Fed. R. Civ. P. 12(b)(1) and her argument that under the Eleventh Amendment this court lacks subject matter jurisdiction to decide a state-law injunction claim against a state official sued in

his official capacity. For the reasons stated below, the motions to dismiss [# 25, # 29] are granted.

This case is almost identical to one filed in 2005 in the Circuit Court of Cook County where the Illinois Hotel and Lodging Association raised substantially the same claims that the Hotel has raised in this court. Circuit Judge James Henry granted summary judgment to the defendants, finding that the Amendment was not preempted by the NLRA and that it did not violate the special legislation clause of the Illinois Constitution or plaintiffs' right to equal protection. *See Ill. Hotel & Lodging Ass'n v. Ludwig*, 869 N.E.2d 846, 374 Ill. App. 3d 193 (Ill. App. Ct. 1st Dist. 2007). Plaintiffs appealed. The appellate court denied their request for a stay and indicated that there was no significant possibility of reversal. Four days after that, the Hotel filed this case.[2] On May 18, 2007, Judge Henry's holding was affirmed. *Ill. Hotel & Lodging Ass'n v. Ludwig*, 869 N.E.2d at 855. The appellate court's opinion is well-reasoned and this court finds it to be persuasive.

STANDARD FOR A MOTION TO DISMISS

A motion to dismiss under Rule 12(b)(6) challenges the complaint on the basis of a failure to state a claim on which relief can be granted. In ruling on the motion, the court accepts as true all well-pleaded facts

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[2] To avoid the preclusive effect of the Illinois case, the Hotel alleges that it is not a member of the Illinois Hotel and Lodging Association. Complaint, at ¶ 7.

alleged in the complaint and draws all reasonable inferences from those facts in favor of the plaintiff. *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 977 (7th Cir. 1999). The complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007).

ALLEGATIONS FROM THE COMPLAINT

The Hotel is located at 520 S. Michigan Avenue in Chicago, Illinois, in Cook County. The Hotel and Unite Here have been involved in collective bargaining since their most recent agreement expired on December 31, 2002. Starting in June of 2003 and continuing through the present, Unite Here has been engaged in a work stoppage while negotiations continue. The Hotel continues to fulfill the terms of the expired agreement, which include the following: a work day of eight productive hours, one free meal to room attendants during a customary half-hour unpaid break, and clean and sanitary facilities in which the room attendants may eat their meals, which the attendants are obligated to cooperate in maintaining.

The Amendment provides as follows:

§ 3.1. Hotel room attendants.

(a) As used in this Section, "hotel room attendant" means a person who cleans or puts in order guest rooms in a hotel or other establishment licensed for transient occupancy.

(b) This Section applies only to hotels and other establishments licensed for transient occupancy that are located in a county with a population greater than 3,000,000.

(c) Notwithstanding any other provision of law, every hotel room attendant shall receive a minimum of 2 15-minute paid rest breaks and one 30-minute meal period in each workday on which the hotel room attendant works at least 7 hours. An employer may not require any hotel room attendant to work during a break period.

(d) Every employer of hotel room attendants shall make available at all times a room on the employer's premises with adequate seating and tables for the purpose of allowing hotel room attendants to enjoy break periods in a clean and comfortable environment. The room shall have clean drinking water provided without charge.

(e) Each employer of hotel room attendants shall keep a complete and accurate record of the break periods of its hotel room attendants.

(f) An employer who violates this Section shall pay to the hotel room attendant 3 times the hotel room attendant's regular hourly rate of pay for each workday during which the required breaks were not provided.

(g) It is unlawful for any employer or an employer's agent or representative to take any act-

ion against any person in retaliation for the exercise of rights under this Section. In any civil proceeding brought under this subsection (f), if the plaintiff establishes that he or she was employed by the defendant, exercised rights under this Section, or alleged in good faith that the defendant was not complying with this Section, and was thereafter terminated, demoted, or otherwise penalized by the defendant, then a rebuttable presumption shall arise that the defendant's action was taken in retaliation for the exercise of rights established by this Section. To rebut the presumption, the defendant must prove that the sole reason for the termination, demotion, or penalty was a legitimate business reason.

(h) In addition to the remedies provided in Sections 6 and 7, a person claiming violation of this Section shall be entitled to all remedies available under law or in equity, including but not limited to damages, back pay, reinstatement, or injunctive relief. Any person terminated in violation of this Section shall recover treble his or her lost normal daily compensation and fringe benefits, together with interest thereon, and any consequential damages suffered by the employee. The court shall award reasonable attorney's fees

and costs to a prevailing plaintiff in an enforcement action under this Section.

820 Ill. Comp. Stat. 140/3.1

NATIONAL LABOR RELATIONS ACT

The Constitution's Supremacy Clause states, in pertinent part, that "the Laws of the United States which shall be made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Any state law that conflicts with acts of Congress, such as the NLRA, is invalidated by this provision. *Rose v. Ark. State Police*, 479 U.S. 1, 3, 107 S. Ct. 334, 93 L. Ed. 2d 183 (1986). Since the NLRA does not contain an explicit preemption clause, the governing rule is that the state law should be sustained "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S. Ct. 1185, 55 L. Ed. 2d 443 (1978). With respect to the NLRA, Congress's declared purpose was "to remedy '[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.'" *Metropolitan Life Ins. Co. v. Mass. Travelers Ins. Co.*, 471 U.S. 724, 753, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985) (citing 29 U.S.C. § 151). The NLRA is therefore "concerned primarily with establishing an equitable

process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Id.*

Two NLRA preemption doctrines have developed. The first, found in *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959), forbids state regulation of activities that the NLRA protects or prohibits. *Id.* at 244-45. *Garmon* preemption is designed to "prevent conflict between state and local regulation and Congress' integrated scheme of regulation." *Cannon v. Edgar*, 33 F.3d 880, 884 (7th Cir. 1994). It applies when the matter the state seeks to regulate is "arguably within the compass of [section seven] or [section eight] of the [National Labor Relations] Act." *Garmon*, 359 U.S. at 246. Section seven of the NLRA explicitly sanctions activities that union employees may engage in, such as,

> the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as

> a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157. Section eight declares certain activities to be forbidden as unfair labor practices, such as an employer's interfering with the rights guaranteed by section seven or discriminating in hiring between union and nonunion employees, or, in the case of labor unions, forcing individuals to join unions or refusing to bargain collectively with an employer. *See* 29 U.S.C. § 158. Section eight also articulates the obligation of both employers and unions to bargain collectively but notes that that obligation does not compel either party to agree to a proposal or make a concession. *Id. Garmon* preemption protects the National Labor Relations Board's primary jurisdiction in cases involving the above sections. *Livadas v. Bradshaw*, 512 U.S. 107, 117 n. 11, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994).[3]

The Supreme Court established another form of preemption in *Lodge 76, Int'l Ass'n Machinists & Aerospace Workers, AFL-CIO v. Wis. Employment Relations Comm'n*, 427 U.S. 132, 96 S. Ct. 2548, 49 L.

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[3] *Garmon* preemption has two exceptions, namely when the challenged activity is "of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility." *Belknap, Inc. v. Hale*, 463 U.S. 491, 498, 103 S. Ct. 3172, 77 L. Ed. 2d 798 (1983) (citing *Garmon*, 359 U.S. at 243-44); *see also Kolentus v. Avco Corp.*, 798 F.2d 949, 961 (7th Cir. 1986). Neither exception has been argued to be at issue here.

Ed. 2d 396 (1976). *Machinists* preemption prohibits state and municipal regulation of areas that Congress left to the free play of economic forces. *Id.* at 140. The Court recognized that "Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represent[ed] an intentional balance" between the powers of management and labor. *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 614, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986). *Machinists* preemption applies to restrictions by states on those methods of economic pressure that Congress has left to the parties. States are not allowed to make such methods illegal. *See Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776 (A.F.L.)*, 346 U.S. 485, 501, 74 S. Ct. 161, 98 L. Ed. 228 (1953) (the state does not have the ability to enjoin union picketing); *520 Michigan Ave. Assoc., Ltd. v. Devine*, 433 F.3d 961, 965 (7th Cir. 2006) (the state may not criminalize an employer's act of hiring replacement workers). Thus, both forms of preemption are interested in the process of collective bargaining, not with specific terms.

The complaint appears to assert that both *Garmon* and *Machinist* preemption apply to the Amendment. The Hotel alleges that the Amendment interferes with the collective bargaining process and upsets the balance of economic power between it and Unite Here. It complains that the Amendment requires it to unilaterally alter the terms of the collective bargaining agreement by implementing the terms of the Amendment in place of those in the agreement. In other

words, the legislature's action has forced the Hotel to accede to a contract term that it was in the midst of negotiating with Unite Here.

This argument is similar to the one that the Supreme Court rejected in *Metropolitan Life*. There, a Massachusetts statute required that specified mental health care benefits be provided to a Massachusetts resident insured under a general insurance policy or an employee health care plan. 471 U.S. at 728. Because the terms of benefit plans were the subject of collective bargaining agreements between unions and employers or insurers, the appellants in *Metropolitan Life* argued that the statute was in effect mandating terms of collective bargaining agreements and should be preempted. *Id.* at 748. Furthermore, their position was that the NLRA intended to prevent states from determining standards "that labor and management would otherwise have been required to negotiate from their federally protected bargaining positions, and would otherwise have been permitted to set at a lower level than that mandated by state law." *Id.* at 751. Similarly, in *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 3, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987), Maine implemented a statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing. The appellant argued that although the state was not directly regulating the economic activity of the parties, it was indirectly undercutting the collective bargaining process. *Id.* at 20.

The Supreme Court ruled that neither statute was preempted and explained that "the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for 'there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining.'" *Fort Halifax*, 482 U.S. at 21-22 (quoting *Malone*, 435 U.S. at 504-05). Furthermore, the fact that a matter is the subject of negotiations does not prevent a state from passing "legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements." *Beckwith v. United Parcel Service*, Inc., 889 F.2d 344, 348 (1st Cir. 1989) (citing *Metropolitan Life*, 471 U.S. at 754-55). These minimum substantive requirements, also termed minimum labor standards, allow "both employers and employees to come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Fort Halifax*, 482 U.S. at 21 (citing *Metropolitan Life*, 471 U.S. at 757). "No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA." *Metropolitan Life*, 471 U.S. at 754-55. Therefore, while a state is not allowed to dictate the actual terms of

collective bargaining agreements, *Commonwealth Edison v. Int'l Bhd. Elec. Workers*, 961 F. Supp. 1169, 1180 (N.D. Ill. 1997), minimum labor standards do not constitute specific terms that the parties must write into their agreements. Instead, they determine a baseline below which the negotiations may not fall.

This point is illustrated by comparison to cases in which courts have found that states have impermissibly intruded into the collective bargaining process by requiring parties to agree to a specific term. In *Cannon v. Edgar*, 33 F.3d 880, 882 (7th Cir. 1994), the Illinois Burial Rights Act required cemeteries and gravediggers to negotiate and agree on the establishment of a pool of workers designed to perform religiously required interments during labor disputes. If the parties did not agree on such a pool by a specified date, they would be in violation of the statute. *Id.* The Seventh Circuit affirmed the district court's holding that the statute was preempted. *Id.* at 885. It found the statute preempted under both *Garmon* and *Machinists*, explaining that the "Burial Rights Act intrudes on the collective bargaining process in a variety of ways; it orders the parties to negotiate as to a specific substantive condition . . . . And more invasive, the Burial Rights Act orders the parties to agree on a pool of workers, or face sanctions for a failure to do so . . . . It directly interferes with the ability of the cemeteries and gravediggers to reach an agreement unfettered by the (labor) restrictions of state law." *Id.* at 885-86.

In *Commonwealth Edison*, the Illinois Successor Statute provided that when a collective bargaining agreement contains a "successor clause," a new employer would be required to honor the obligations of its predecessor's agreement. 961 F. Supp. at 1171. Judge Andersen found that the statute was preempted by *Garmon*, because it "eliminate[d] the bargaining process altogether by forcing a new employer to honor a collective bargaining agreement it neither bargained for nor assumed. We have no doubt that such compulsion violates the NLRA's mandate that the parties not be compelled to agree to a proposal or make a concession." *Id.* at 1181.

In both *Cannon* and *Commonwealth Edison*, the state statutes required the parties to incorporate specific substantive terms into their agreements. These were not merely baselines, which would have allowed the parties to negotiate what the actual terms would be, but instead made the parties' decisions for them, leaving no room for continued negotiation. Therefore, both statutes were preempted.

The court in *Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497, 501 (9th Cir. 1995), provided the following helpful framework for analyzing state statutes:

> The [United States Supreme] Court has clearly held that state legislation, which interferes with the economic forces that labor or management can employ in reaching agreements, is pre-

empted by the NLRA because of its interference with the bargaining process. *See, e.g., Machinists*; *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986). The Court has also clearly held that a state's requirement of "minimal substantive requirements" on contract terms is not such an interference with the bargaining process as to be pre-empted. There is no doubt that imposing substantive requirements does affect the bargaining process. Viewed in the extreme, the substantive requirements could be so restrictive as to virtually dictate the results of the contract. The objective of allowing the bargaining process "to be controlled by the free-play of economic forces" can be frustrated by the imposition of substantive requirements, as well as by the interference with the use of economic weapons. *See Barnes v. Stone Container Corp.*, 942 F.2d 689, 693 (9th Cir.1991); *Bechtel Const. v. United Brotherhood of Carpenters*, 812 F.2d 1220, 1226 (9th Cir. 1987). The question then becomes the extent of the substantive requirements that a state may impose on the bargaining process.

The state statute at issue in that case required that employers pay "prevailing wages" to their employees on certain types of private industrial construction projects costing over $500,000. *Id.* at 498. Those prevailing wages were to be ascertained by reference to established collective-bargaining agreements within the

locality in which the public work was to be performed. *Id.* at 499. An employer seeking to engage in construction covered by the ordinance had to agree to comply with its terms and to pay the state-determined prevailing wage for public works before the County would issue a building permit for the private construction project. *Id.* The manner in which the ordinance operated affected not only the total of the wages and benefits to be paid, but also the division of the total package that would be paid in hourly wages directly to the worker and the amount paid by the employer in health, pension, and welfare benefits for the worker. *Id.* at 502.

The court determined that this statute went too far and was preempted, reasoning that "[i]t is clear that this Ordinance affects the bargaining process in a much more invasive and detailed fashion than [did the statutes] approved in *Metropolitan Life* and *Fort Halifax* . . . . This Ordinance provides for specific minimum wages and benefits to be paid to each craft and only to those workers who are engaged in the specific construction projects covered by the Ordinance . . . . Furthermore, this type of minimum labor standard enactment, which is not of general application, but targets particular workers in a particular industry and is developed and revised from the bargaining of others, affects the bargaining process in a way that is incompatible with the general goals of the NLRA." *Bragdon*, 64 F.3d at 502-04.

Finally, an Oregon law mandating minimum rest periods only for *nonunion* workers was preempted by the NLRA due to the effect the law would have on collective bargaining in forcing unionized workers to bargain for what would have been their right if they were not in the union. *McCollum v. Roberts*, 17 F.3d 1219, 1222-24 (9th Cir. 1994).

Minimum labor standards are usually discussed in the context of *Machinists* preemption, but they also should be considered with relation to *Garmon*. As stated above, minimum labor standards bestow rights on employees as individuals and form a backdrop for the bargaining process. *Garmon* prohibits state restrictions on the specifically condoned and prohibited activities enumerated in the NLRA while *Machinists* covers those that were not expressly addressed. Or, as stated by the Ninth Circuit in *Bragdon*, 64 F.3d at 499-500, "the NLRA prevents a State from regulating within the protected zone, whether it be a zone protected and reserved for market freedom, *see Machinists*, or for NLRB jurisdiction, *see Garmon*."

The Amendment does not directly restrict any conduct permitted by section 7 or prohibited by section 8 of the NLRA or any economic weapons of self-help left unregulated by Congress. Under *Metropolitan Life*, the fact that the Amendment deals with a contested subject of negotiation is insufficient to find it to be preempted. 471 U.S. at 754-55. The remaining question is thus whether it indirectly restricts any protected activities,

thereby frustrating the goals of the NLRA, or if it instead qualifies as a minimum labor standard. If it qualifies as a minimum labor standard, it will not be preempted under either *Garmon* or *Machinists*.

The Amendment applies only to counties in Illinois with a population of greater than 3,000,000, which limits its effect to Cook County. Its effect is also limited to one small group of employees in a single industry: hotel room attendants. Otherwise, however, it affects union and non-union employees equally.

The geographic limitation of the Amendment and its limitation to a particular group within the workforce do not automatically preclude it from being a minimum labor standard. While many laws that are thought of as minimum labor standards do have broad application, the Ninth Circuit upheld a wage law that applies specifically to apprentices in the construction business. *Assoc. Builders & Contractors of S. Cal., Inc. v. Nunn*, 356 F.3d 979 (9th Cir. 2004). The Second Circuit has held that a wage regulation that applied only to public works projects was a minimum labor standard and therefore not subject to preemption. *Rondout Elec., Inc. v. N.Y. State Dept. of Labor*, 335 F.3d 162, 168-169 (2nd Cir. 2003). According to these cases, minimum labor standards do not have to apply to all workers in a state or even a profession. The Hotel has cited no case to the contrary and the court has found none.

While the Amendment's narrow reach and notable timing distinguish it from a typical minimum

labor standard, it does not supplant the parties' negotiations by making their decision for them, as in *Cannon* and *Commonwealth Edison*. The Amendment also does not go as far as the state did in *Bragdon*. The requirement that hotels allow employees at least three breaks in a seven-hour day and that a room be provided for the employees to use is not as invasive into the collective bargaining process as the complex wage determining scheme was in *Bragdon*.

Furthermore, the Amendment complies with the description of a minimum labor standard set forth by the Supreme Court in *Metropolitan Life* and *Fort Halifax*: "minimum labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." *Metropolitan Life*, 471 U.S. at 755. The Amendment forms a backdrop for negotiations in collective bargaining agreements, as union representatives now have these rest periods as the baseline below which the management cannot fall in what they offer as contract terms. It does not discourage negotiation over the actual terms of the agreement between Unite Here and the Hotel, and does not determine what those actual terms will be. In summary, the Amendment does not interfere with the

collective bargaining process in a way that is legally significant under NLRA jurisprudence. It is therefore not preempted by the NLRA.[4]

LABOR MANAGEMENT RELATIONS ACT

The Hotel also asserts that section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), applies to this case. Section 301 provides that suits for violations of contracts between unions and employers may be brought in the federal district courts. 29 U.S.C. § 185(a).[5] "In order to determine whether a

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[4] The Hotel argues that the Amendment unilaterally changes terms of the collective bargaining agreement, which the NLRA proscribes. The cases that the Hotel relies on all pertain to situations in which an employer changed break periods under its own power, not due to a change in state law, which is a significant distinction from this case.

[5] The Supreme Court in *United Steelworkers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 368, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990), explained section 301 preemption in more depth:

> Over 30 years ago, this Court held that § 301 not only provides the federal courts with jurisdiction over controversies involving collective-bargaining agreements but also authorizes the courts to fashion "a body of federal law for the enforcement of these collective bargaining agreements." *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 451, 77 S. Ct. 912, 915, 1 L. Ed. 2d 972 (1957). Since then, the Court has made clear that § 301 is a potent source of federal labor law, for though state courts have

(continued...)

party's state law claims are preempted under § 301, courts must decide whether the resolution of the state law claim depends on the meaning of, or requires the interpretation of, a collective bargaining agreement." *Commonwealth Edison*, 961 F. Supp. at 1174 (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 407, 409-10, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988)). Most cases where section 301 preemption is applied involve a plaintiff's invoking state law to make a claim of entitlement to a benefit. *See, e.g., Baker v. Kingsley*, 387 F.3d 649, 652 (7th Cir. 2004) (plaintiffs attempted to bring a claim that defendant violated an Illinois statute regarding wage payment and collection but the court determined that resolution of that claim was preempted because it would require a substantive analysis of the applicable agreement).

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[5] (...continued)
concurrent jurisdiction over controversies involving collective-bargaining agreements, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483 (1962), state courts must apply federal law in deciding those claims, *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962), and indeed any state-law cause of action for violation of collective-bargaining agreements is entirely displaced by federal law under § 301, *see Avco Corp. v. Machinists*, 390 U.S. 557, 88 S. Ct. 1235, 20 L. Ed. 2d 126 (1968). State law is thus "pre-empted" by § 301 in that only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective-bargaining agreements.

The mere existence of a collective bargaining agreement does not necessarily require its interpretation. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985) ("Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law."). Instead, courts distinguish between cases that merely involve a reference to a collective bargaining agreement from those where the courts will actually have to determine the meaning of a term. *Baker v. Kingsley*, 387 F.3d at 658-59.

Plaintiffs reference the existence of section 301 preemption in their complaint and their opposition to the defendants' motions to dismiss but provide no basis for the court to apply it in this case. The subject of the dispute here is the constitutionality of the Amendment. While the existence (or lack thereof) of a collective bargaining agreement is marginally relevant to the Amendment's status with respect to *Garmon* and *Machinists* preemption, there is no need to interpret the meaning of any provisions in order to determine whether the Amendment is constitutional. If employees have claims under the Amendment, they will be entitled to triple their daily wage, which can easily be determined with minimal consultation of the collective bargaining agreement. Furthermore, the meaning of the expired collective bargaining agreement in this case

is not disputed. Therefore, section 301 preemption does not apply.

EQUAL PROTECTION AND DUE PROCESS

The Hotel also asks for a declaration that the Amendment violates its rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. In its complaint, however, the Hotel does not include any allegations at all to support this claim. In its response to the motions to dismiss, it attacks some of the defendants' proposed rational bases for the Amendment, but fails to explain why the Amendment lacks any rational basis.

The standard that the court must apply here in evaluating the constitutionality of the Amendment is the deferential rational basis test. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Fed'l Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). Courts must respect a strong presumption of validity of statutes such as these, and litigants who attack their rationality have the burden to "negative every conceivable basis which might support [them]. . . . Moreover, because [courts] never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for

constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature . . . . In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 314-15 (citations omitted); *see also Smith v. City of Chi.*, 457 F.3d 643, 651 (7th Cir. 2006).

This standard applies on a motion to dismiss despite the leniency of Federal Rules of Civil Procedure 8 and 12(b)(6). "To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *Wrobleski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992) (holding that the plaintiff's complaint's "conclusionary assertion that the policy is 'without rational basis' [was] insufficient to overcome the presumption of rationality coupled with the readily apparent justification for the policy."). Courts in this district have "repeatedly granted 12(b)(6) motions to dismiss an equal protection claim when the government action is rationally related to a legitimate objective." *Ill. Med. Transp. Providers Assoc. v. City of Chi.*, 2003 WL 193187, at *1 (N.D. Ill. Jan. 28, 2003). There is no need to first hold a hearing or consider evidence before determining whether a complaint meets this standard. *Maguire v. Thompson*, 957 F.2d 374, 378 (7th Cir. 1992); *see also Univ. Prof'ls of Ill. v. Local 4100, IFT-AFT, AFLCIO*, 114 F.3d 665, 667 (7th Cir. 1997) ("No quantum of evidence is necessary

to demonstrate this relationship between means and end: to defeat an equal protection claim subject to rational basis scrutiny, defendants-appellants must only proffer a sound reason for the legislation. . . . With no opportunity for fact-finding in this case, we do not possess a developed record on the legislative judgment. None is necessary because adequate reasons abound.").

Adequate reasons abound in this case. Many were articulated in the Illinois Appellate Court's decision, and the court refers to that decision for a more comprehensive statement of the possibilities. *See Ill. Hotel and Lodging Ass'n v. Ludwig*, 869 N.E.2d 846, 851-53, 374 Ill. App. 3d 193 (Ill. App. 1st Dist. 2007).[6] For example, the legislature may have constrained the Amendment's effect to Cook County because of the high volume of tourism specific to Chicago. There are many

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[6] The Hotel argues that the court cannot consider the procedural history of the Illinois case or any facts found therein without converting this motion to one for summary judgment. That is incorrect because as stated above, the court need not find that any of the reasons that the Illinois courts found to support the Amendment's rationality are facts in order to consider them for the purpose of this motion. Rather, they can assist this court in the speculation that it must engage in merely by suggesting possible bases for the legislature's decision, whether or not they actually were motivations for the passing of the statute. Additionally, courts routinely consider cases, including their procedural histories, on motions to dismiss. Doing so cannot require conversion to summary judgment.

more hotels there than in any other area of the state. By extension, hotel employees may be required to work harder. Additionally, hotels in Chicago are larger and perhaps more economically able to handle additional financial burden. The legislature may have wished to avoid burdening the smaller hotels found in other parts of the state. Furthermore, "the Illinois statute books are riddled with laws that treat communities with more than 500,000 residents — i.e. Chicago — differently from smaller ones." *Hearne v. Bd. of Educ. of the City of Chi.*, 185 F.3d 770, 774 (7th Cir. 1999). Like the court hypothesized in *Hearne*, the legislature may have limited the effect of the Amendment because it believe that hotel workers in Chicago are in a crisis situation, or that due to the hotels' larger size, it would be more effective to treat them differently. *Id.* at 775. Finally, the legislature could have intended to gradually introduce the provisions of the Amendment throughout the state and decided that Cook County was a logical place to start, for some or all of the above-stated reasons. It "must be allowed leeway to approach a perceived problem incrementally." *Beach Commc'ns*, 508 U.S. at 316.

There are also many potential justifications for the legislature's decision to address hotel workers as opposed to the rest of the workforce. As suggested by the defendants, the legislature could reasonably have concluded that hotel room attendants are at particular risk of injury due to their job requirements of lifting increasingly heavy mattresses and other furniture,

especially when considering the strict quota requirements imposed by hotel management. Workplace regulation targeting particular occupations is quite common in Illinois, *see* Unite Here's Mem. Supp. Mot. Dismiss, at 12 (listing statutes), and courts have recognized the propriety of such distinctions. *See Nunn*, 356 F.3d at 990 ("[S]tate substantive labor standards . . . are not invalid simply because they apply to particular trades, professions, or job classifications rather than to the entire labor market.").

Though the Hotel asserts that the reasons given by the defendants for the legislation are neither rational nor reasonable, it does not persuasively explain why that is the case. If, as the Hotel claims in its response to the motions to dismiss, Cook County hotels are "more likely to have available workers and equipment to assist room attendants with physical work," then these hotels would also be better able to implement the requirements of the Amendment. Furthermore, if there are likely to be more available workers, then the Amendment, by the Hotel's own scenario, is reaching a greater number of workers inside Cook County than it would in other areas of the state. The Hotel's response merely highlights the ways in which Cook County is different from other counties in Illinois, which supports the Amendment's classification.

With regard to due process, the Hotel has provided no explanation at all of the basis for its claim in either its complaint or its response to the motions to

dismiss. Furthermore, it is unclear whether the Hotel is alleging a violation of procedural due process or substantive due process. The Hotel does concede, however, that its due process claim should be evaluated using the rational basis test. Hotel's response, at 20. Therefore, the due process claim will be dismissed based on the same reasoning as stated above regarding the equal protection claim.

SUBJECT MATTER JURISDICTION

This court's jurisdiction over the state law claims is invoked under 28 U.S.C. § 1367. Having dismissed the federal claims, the court may use its discretion to decline jurisdiction over the remaining state law claims under 28 U.S.C. § 1367(c)(3). In determining whether to exercise jurisdiction, "a district court should consider and weigh the factors of judicial economy, convenience, fairness and comity." *Wright v. Assoc. Ins. Cos., Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)). "Relinquishing jurisdiction over supplemental state law claims is the normal course of action when the federal claims are dismissed before trial." *Ill. Med. Transp. Providers Assoc.*, 2003 WL 193187, at *2 (citing *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 727-28 (7th Cir. 1998)).

As a similar case has recently been adjudicated at both the trial and appellate levels of the Illinois state courts, it is prudent to relinquish jurisdiction over the state law claims. The case has not moved beyond the

pleading stage in this court and there will be no duplication of efforts if this court relinquishes jurisdiction. Further, in deciding the federal issues, the court has not reached the merits of the state law claims. In *Ill. Med. Transp. Providers Assoc.*, Judge Bucklo dismissed an equal protection challenge to an Illinois Statute and then dismissed the pendent state law claims. This court will do the same. Since the court must relinquish jurisdiction over the state law claims, there is no need to reach the Director's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction.

CONCLUSION

For the reasons stated above, defendants' motions to dismiss [# 25, # 29] are granted pursuant to Fed. R. Civ. P. 12(b)(6). The court relinquishes jurisdiction over the plaintiff's state law claims. The complaint is dismissed with prejudice and this case is terminated.

ENTER: /s/ Joan Humphrey Lefkow
United States District Judge

Dated: September 17, 2007

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

520 S. MICHIGAN AVENUE, LTD., d/b/a THE CONGRESS PLAZA HOTEL & CONVENTION CENTER,	)	
Plaintiff,	)	No. 06 C 4552
v.	)	Judge Joan H. Lefkow
CATHERINE SHANNON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF LABOR, Defendant, and UNITE HERE LOCAL 1, Intervenor-Defendant.	)	

JUDGMENT ORDER

Pursuant to the decision in *520 S. Michigan Ave. Associates v. Shannon*, 549 F.3d 1119 (7th Cir. 2008), it is hereby ordered as follows:

1. The 2005 amendments [t]o the Illinois One Day Rest in Seven Act, 820 ILCS 140/3.1(a)-(h), enacted in Public Act 94-593, are hereby declared preempted under the Supremacy Clause of the United

States Constitution, U.S. Constitution, art. VI, cl. 2, by the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.*

2. Final judgment is entered on plaintiff's claim for declaratory relief. All other issues on the merits having been disposed of, final judgment is entered.

3. The court retains jurisdiction over any application for an award of attorney's fees.

/s/ Judge Joan Humphrey Lefkow

Enter: April 20, 2009

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of the Assigned Judge or Magistrate Judge	*Joan H. Lefkow*	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	*06 C 4552*	**DATE**	*4/20/2009*
CASE TITLE	*520 S. Michigan Avenue Associates, Ltd. vs. Shannon, et al.*		

DOCKET ENTRY TEXT

Enter Judgment Order. Final judgment entered on plaintiff's claim for declaratory relief. The court retains jurisdiction over any application for an award of attorney's fees. Civil Case Terminated.

■For further details see below.

The court declines to enter an injunction on the basis that the record does not permit an inference that the defendant would defy the court's declaration of the rights of the parties by attempting to enforce the

preempted state law against the defendant. See Doran v. Salem Inn, 422 U.S. 922, 931 (1975) ("At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary."). Moreover, McKenzie v. City of Chicago, 118 F.3d 552 (7th Cir. 1997), teaches that an injunction prohibiting a defendant from enforcing the state law against a non-party is beyond this court's authority. *The plaintiff's right of action rests in 42 U.S.C. § 1983; thus it may apply for an award of fees under 42 U.S.C. § 1988. The court will consider after briefing whether under applicable legal standards fees should be awarded.*

Court Deputy Initials:	MD

APPENDIX E

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604

January 28, 2009

Before
Daniel A. Manion, *Circuit Judge*
Michael S. Kanne, *Circuit Judge*
John Daniel Tinder, *Circuit Judge*

No. 07-3377

520 S. Michigan Avenue Associates, Ltd., d/b/a The Congress Plaza Hotel & Convention Center, Plaintiff-Appellant, v. Catherine Shannon, Director of the Illinois Department of Labor, Defendant-Appellee, *and* Unite Here Local 1, Intervenor-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 06 C 4552 Joan Humphrey Lefkow, *Judge*

ORDER

On consideration of the petition for rehearing en banc filed by appellees, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX F

The Room Attendant Amendment to the Illinois One Day Rest in Seven Act, 820 ILCS 140/3.1

Hotel room attendants.

(a) As used in this Section, "hotel room attendant" means a person who cleans or puts in order guest rooms in a hotel or other establishment licensed for transient occupancy.

(b) This Section applies only to hotels and other establishments licensed for transient occupancy that are located in a county with a population greater than 3,000,000.

(c) Notwithstanding any other provision of law, every hotel room attendant shall receive a minimum of 2 15-minute paid rest breaks and one 30-minute meal period in each workday on which the hotel room attendant works at least 7 hours. An employer may not require any hotel room attendant to work during a break period.

(d) Every employer of hotel room attendants shall make available at all times a room on the employer's premises with adequate seating and tables for the purpose of allowing hotel room attendants to enjoy break periods in a clean and comfortable environment. The room shall have clean drinking water provided without charge.

(e) Each employer of hotel room attendants shall keep a complete and accurate record of the break periods of its hotel room attendants.

(f) An employer who violates this Section shall pay to the hotel room attendant 3 times the hotel room attendant's regular hourly rate of pay for each workday during which the required breaks were not provided.

(g) It is unlawful for any employer or an employer's agent or representative to take any action against any person in retaliation for the exercise of rights under this Section. In any civil proceeding brought under this subsection (f), if the plaintiff establishes that he or she was employed by the defendant, exercised rights under this Section, or alleged in good faith that the defendant was not complying with this Section, and was thereafter terminated, demoted, or otherwise penalized by the defendant, then a rebuttable presumption shall arise that the defendant's action was taken in retaliation for the exercise of rights established by this Section. To rebut the presumption, the defendant must prove that the sole reason for the termination, demotion, or penalty was a legitimate business reason.

(h) In addition to the remedies provided in Sections 6 and 7, a person claiming violation of this Section shall be entitled to all remedies available under law or in equity, including but not limited to damages, back pay, reinstatement, or injunctive relief. Any per-

son terminated in violation of this Section shall recover treble his or her lost normal daily compensation and fringe benefits, together with interest thereon, and any consequential damages suffered by the employee. The court shall award reasonable attorney's fees and costs to a prevailing plaintiff in an enforcement action under this Section.

APPENDIX G

FIFTH DIVISION
May 18, 2007

No. 1-06-2228

THE ILLINOIS HOTEL AND LODGING ASSOCIATION, an Unincorporated Association,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 05 CH 13796
ART LUDWIG, Director, The Department of Labor, and UNITE HERE LOCAL 1,	)	Hon. James F. Henry, Judge
Defendants-Appellees.	)	Presiding.

PRESIDING JUSTICE O'BRIEN delivered the opinion of the court:

Plaintiff, the Illinois Hotel and Lodging Association, filed a declaratory judgment action against defendant, the Director for the Illinois Department of Labor, seeking to have section 3.1 of the One Day Rest in Seven Act (the Act) (820 ILCS 140/3.1 (West Supp. 2005)) declared unconstitutional on the grounds that it violated the Illinois Constitution's prohibition against

special legislation, as well as the equal protection clauses of the Illinois Constitution and United States Constitution, and the supremacy clause of the United States Constitution. The trial court granted defendant Unite Here Local 1 leave to intervene. The parties filed cross-motions for summary judgment. The trial court found that section 3.1 of the Act passes constitutional muster and granted defendants' motion for summary judgment. Plaintiff appeals. We affirm.

Plaintiff is a statewide trade association of Illinois hotels with members operating hotels in Cook County. Plaintiff's purpose is to promote the welfare and interests of its members and of the hospitality industry in general.

Unite Here Local 1 represents approximately 1,722 room attendants in Cook County and the Chicago metropolitan area. The room attendants' job is to clean guest rooms. Generally, all room attendants change bed linens, remove dirty sheets and towels, clean bathrooms, vacuum, replace amenities in bathrooms (i.e., soap, tissue, shampoo, etc.), dispose of garbage, and dust and tidy guests' clothes.

Hotel room attendants essentially work on a piece-rate system. Both union and nonunion hotels require room attendants to clean a quota of rooms each work shift. Although they are paid by the hour, room attendants are required to deliver a quantified amount of work during their shift and can be disciplined if they fail to do so.

The quota system forces many room attendants to skip breaks. In a published survey of room attendants, two-thirds stated that they had skipped or shortened lunch or rest breaks, or worked longer hours, to complete assigned rooms.

The workload pressure facing room attendants has contributed to injury. Ergonomic research conducted by the Ohio State University Biodynamics Laboratory found that the typical tasks performed by hotel housekeepers put these workers at a very high risk for lower back disorder.

Hotel room attendant work has become more strenuous in recent years. Hotel chains have engaged in so-called "bedding wars," adding heavier mattresses, more pillows and additional amenities to compete for travelers' dollars. A published survey of room attendants found that work intensification over the previous five years, measured by the increased number and intensity of tasks required to clean a room, had led to a statistically significant increase in neck pain and lower back pain among room attendants.

Section 3.1 of the Act was introduced and passed to protect hotel room attendants from overwork. Section 3.1(c) (820 ILCS 140/3.1(c) (West Supp. 2005)) requires employers to provide hotel room attendants with two 15-minute breaks and one 30-minute meal period in each workday in which the room attendant works at least seven hours. Section 3.1(d) also requires the employers of hotel room attendants to make

available a room with adequate seating and tables for room attendants to enjoy the break. 820 ILCS 140/3.1(d) (West Supp. 2005). The room shall have clean drinking water provided without charge. 820 ILCS 140/3.1(d) (West Supp. 2005). Hotel room attendants who have been denied the mandated break periods have a private cause of action for treble damages and are protected against retaliation for invoking the Act. See 820 ILCS 140/3.1(f),(g) (West Supp. 2005). Section 3.1 applies only to hotel room attendants employed in counties with a population greater than 3 million, i.e., to employees of hotels located in Cook County. See 820 ILCS 140/3.1(b) (West Supp. 2005).

On August 16, 2005, one day after section 3.1's effective date, plaintiff filed a verified complaint for declaratory judgment and injunctive relief against Art Ludwig, the Director of the Illinois Department of Labor. In its four-count complaint, plaintiff alleged that section 3.1 was special legislation in violation of article IV, section 13, of the Illinois Constitution; violated the equal protection clauses of the Illinois Constitution and the United States Constitution; and was preempted by the National Labor Relations Act (NLRA) (29 U.S.C. §151 et seq. (2000)).

Plaintiff concurrently moved for a temporary restraining order. On August 18, 2005, the circuit court granted the restraining order, enjoining the Director from enforcement of section 3.1. The court granted Unite Here Local 1 leave to intervene. The parties filed

cross-motions for summary judgment. On July 28, 2006, the circuit court rejected plaintiff's special legislation, equal protection, and preemption arguments, granted defendants' motion for summary judgment, and dissolved the temporary restraining order that previously had been entered. Plaintiff filed this timely appeal.

First, plaintiff contends that section 3.1 constitutes unconstitutional special legislation. The special legislation provision of the Illinois Constitution of 1970 states:

> "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." Ill. Const. 1970, art. IV, §13.

"All statutes enjoy a strong presumption of constitutionality, and the party challenging the statute bears the burden of clearly rebutting this presumption." County of Cook v. Illinois Labor Relations Board Local Panel, 347 Ill. App. 3d 538, 549 (2004). The special legislation clause prohibits the legislature from conferring a special benefit or exclusive privilege upon one group while excluding other similarly situated groups. In re Estate of Jolliff, 199 Ill. 2d 510, 519 (2002). The legislature has broad discretion in making statutory classifications, and the special legislation clause prohibits only those that are arbitrary. Unzicker v. Kraft Food Ingredients Corp., 203 Ill. 2d 64, 86 (2002). Where, as here, the statute under consideration

does not affect a fundamental right or implicate a suspect class or quasi-suspect class, the appropriate standard of review is the rational basis test. County of Cook, 347 Ill. App. 3d at 550. Under the rational basis test, the court must determine whether the statutory classification is rationally related to a legitimate public interest. County of Cook, 347 Ill. App. 3d at 550. "If this court can reasonably conceive of any set of facts that justifies distinguishing the class the statute benefits from the class outside its scope, it will uphold the statute." Crusius v. Illinois Gaming Board, 216 Ill. 2d 315, 325 (2005).

Our supreme court has further defined the rational basis test when reviewing legislative classifications based on population or territorial differences. Such a classification will survive a special legislation challenge only: (1) where founded on a rational difference of situation or condition existing in the persons or objects upon which the classification rests; and (2) where there is a rational and proper basis for the classification in view of the objects and purposes to be accomplished. In re Petition of the Village of Vernon Hills, 168 Ill. 2d 117, 123 (1995). We review de novo the circuit court's determination of section 3.1's constitutionality. Crusius, 216 Ill. 2d at 324.

Plaintiff contends that section 3.1 of the Act, which provides hotel room attendants with two 15-minute breaks and one 30-minute meal period in each workday in which the room attendant works at least

seven hours, violates the special legislation clause because it applies only to employees of hotels located in Cook County. Plaintiff contends that there is no rational basis to distinguish room attendants in Cook County from those in other counties. Plaintiff also contends that section 3.1's distinction between room attendants in Cook County from those in other counties does not bear any rational relationship to the purpose of the Act, which was to diminish the work burden placed on hotel room attendants.

Plaintiff's argument is unavailing, as the record indicates that in lobbying against the passage of section 3.1, plaintiff itself raised distinctions between hotels in Chicago versus hotels located outside of Cook County. As initially proposed, section 3.1 applied statewide. In lobbying materials used before section 3.1 was amended to apply only to Cook County, plaintiff stressed the effect that the imposition of "Chicago work rules" would have on smaller hotels in other parts of the state. Specifically, in a 2005 lobbying letter to its members, plaintiff asked legislators to vote against "Statewide Imposition of Room Attendant Work Rules" because "smaller businesses will be subjected to these Chicago work rules that will create undue paperwork and litigation loads, inherently financially over-burdening small hotels in Illinois." At a House Labor Committee hearing, plaintiff's president introduced the general manager of a Radisson hotel in Molene, who testified, "[A] couple of the issues on the bill * * * would put some undue pressure on operators, especially the smaller

operators outside of Chicago that may not be able to put a separate break area in their hotel."

Plaintiff's president pointed out that hotels in downstate areas were having difficulty recovering from the terrorist attacks of September 11: "[I]n Rockford, our occupancy is 55%. In the Quad Cities, our occupancy is 56%. Way below the levels that were there pre-9/11." Legislators from downstate areas also stressed the different competitive pressures faced by hotels and motels in their regions. For example, at a House Labor Committee hearing held on March 17, 2005, Representative Dave Winters of Rockford stated, "Chicago doesn't have to compete with — across State lines, but many of the downstate hotels do, and * * * it's another job-killing act that we're doing here in Springfield, and I will oppose it." 94th Ill. Gen. Assem., House Proceedings, March 17, 2005 (statement of Representative Winters).

A compromise bill was forwarded. In explaining the decision to amend the bill to apply only to hotel room attendants in Cook County, Representative Fritchey, the House sponsor of the bill, stated:

> "[I]t was not my intention to unduly burden small little hotels, downstate hotels. And the impetus came from Chicago and Cook County. And in response to concerns raised by * * * legislators, we filed an amendment which was adopted onto the bill yesterday that limited it solely to hotels within

> Cook County." 94th Ill. Gen. Assem., House Proceedings (statement of Representative Fritchey).

Thus, the plaintiff itself recognized differences between Cook County and downstate hotels that justified section 3.1's differentiation between hotel room attendants in Cook County and hotel room attendants elsewhere in Illinois. As a rational basis existed for the legislation, section 3.1 does not run afoul of the special legislation clause.

Further, courts have upheld other statutes that apply only to particular counties or particular cities. In Chicago National League Ball Club, Inc. v. Thompson, 108 Ill. 2d 357 (1985), our supreme court upheld a statute regulating noise at certain types of stadiums used for nighttime sporting events in cities with a population in excess of 1 million. Wrigley Field was the only stadium meeting the statutory definition. Rejecting a special legislation challenge, the supreme court held that "there is a rationally founded difference between a less populous city and a city with a greater population. It might be reasonably anticipated that in a typical urban setting more people would be affected in the larger city by the noise from spectators in a stadium for a nighttime event." Thompson, 108 Ill. 2d at 369-70.

In Cutinello v. Whitley, 161 Ill. 2d 409 (1994), the legislature targeted a transportation infrastructure statute to Du Page, Kane and McHenry Counties alone. The counties defended the statute based on the rapid

population growth in those three counties, arguing that the magnitude of the transportation problem addressed in the statute was greatest in those areas. Cutinello, 161 Ill. 2d at 418. The supreme court agreed that this justification satisfied rational basis review. The supreme court noted that "[t]ransportation problems may exist to a lesser degree in other parts of the State than in the Counties. However, 'the legislature is not bound to pass one law meeting every exigency, but may consider degrees of evil.'" Cutinello, 161 Ill. 2d at 422, quoting People ex rel. County of Du Page v. Smith, 21 Ill. 2d 572, 579 (1961).

Similarly, the legislature here rationally could have concluded from the evidence presented to it that section 3.1's population classification is based on a reasonable appraisal of differences between the hospitality industry in Cook County and that of downstate areas. Specifically, the evidence indicates that Cook County has more hotel room attendants than the rest of the State combined. The evidence also showed that the revenue per available room for all Chicago hotels, which incorporates measures both of the room rate that the hotels can charge and the occupancy that they achieve at that rate, was higher than any other area of the State. The legislature rationally could have concluded from such evidence that section 3.1 would protect hotel room attendants from overwork in the jurisdiction where the majority of such employees would be impacted and in the jurisdiction best

positioned to absorb the costs of section 3.1's new regulations.

Plaintiff contends that such reasoning is speculative. However, our supreme court has held that if a court "can reasonably conceive of any set of facts that justifies distinguishing the class the statute benefits from the class outside its scope, it will uphold the statute." (Emphasis added.) Crusius, 216 Ill. 2d at 325. Further, our supreme court has held that "[u]nder the rational basis test, the court may hypothesize reasons for the legislation, even if the reasoning advanced did not motivate the legislative action." People ex rel. Lumpkin v. Cassidy, 184 Ill. 2d 117, 124 (1998).

Accordingly, as there are conceivable rationales for its classifications, section 3.1 passes constitutional muster. Section 3.1 does not violate the special legislation clause.

Next, plaintiff contends that section 3.1 violates equal protection. An equal protection challenge generally is judged under the same standards applicable to a special legislation challenge. Crusius, 216 Ill. 2d at 325. Therefore, in the present case, plaintiff's equal protection challenge fails for the same reasons discussed above concerning plaintiff's special legislation challenge.

Next, plaintiff contends that section 3.1 violates the supremacy clause of the United States Constitution because it is preempted by the NLRA. There are two

primary doctrines of NLRA preemption, as set forth in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959) (Garmon preemption), and in Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 49 L. Ed. 2d 396, 96 S. Ct. 2548 (1976) (Machinists preemption). The Garmon preemption doctrine "safe-guards the primary jurisdiction of the National Labor Relations Board to pass judgment on certain conduct, such as labor picketing, which might be held protected by §7 of the [National Labor Relations] Act but which might also be prohibited by §8 of the Act." Livadas v. Bradshaw, 512 U.S. 107, 117 n. 11, 129 L. Ed. 2d 93, 106 n.11, 114 S. Ct. 2068, 2075 n.11 (1994). "When an activity is arguably subject to §7 or §8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Garmon, 359 U.S. at 245, 3 L. Ed. 2d at 783, 79 S. Ct. at 780.

Garmon preemption is not applicable here, because section 3.1 of the Act does not touch on conduct protected by section 7 of the NLRA or prohibited by section 8 of the NLRA. Section 7 of the NLRA provides that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid

or protection, and * * * to refrain from any or all of such activities." 29 U.S.C. §157 (2000). Section 8(a) of the NLRA makes it unlawful for employers to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7; to dominate or interfere with the administration of a union; to discriminate on the basis of union membership; to retaliate for participation in proceedings under the NLRA; and to refuse to bargain collectively. 29 U.S.C. §158(a)(1) through (a)(5) (2000). Section 8(b) of the NLRA imposes similar prohibitions on conduct by unions. 29 U.S.C. §158(b) (2000).

Section 3.1 of the Act does not attempt to regulate conduct governed by section 7 or section 8 of the NLRA. Rather, section 3.1 sets forth a minimum labor standard mandating rest breaks and a meal period for individual hotel room attendants in Cook County, whether they work for a union or nonunion employer. Minimum labor standards like those set forth in section 3.1 of the Act are not preempted since "Congress is understood to have legislated against a backdrop of generally applicable labor standards." Livadas, 512 U.S. at 123 n.17, 129 L. Ed. 2d at 109 n.17, 114 S. Ct. at 2078 n.17.

In Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985), and Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987), the United States Supreme Court discussed the interplay between minimum labor standards and the NLRA. In Metro-

politan Life, Massachusetts required health insurance plans, including collectively bargained plans, to have certain mental health benefits prescribed by the state. A unionized employer contended that the law interfered with its right to bargain freely over the content of its medical plan. The United States Supreme Court disagreed, holding that "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain." Metropolitan Life, 471 U.S. at 753, 85 L. Ed. 2d at 749, 105 S. Ct. at 2396. "The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment." Metropolitan Life, 471 U.S. at 754, 85 L. Ed. 2d at 749, 105 S. Ct. at 2397. The Supreme Court further explained:

> "Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self organization established in the Act. Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part 'designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive' the mandated health insurance coverage.

> [Citation.] Nor do these laws even inadvertently affect these interests implicated in the NLRA. Rather, they are minimum standards 'independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization.' [Citation.]" (Emphasis in the original.) Metropolitan Life, 471 U.S. at 755, 85 L. Ed. 2d at 750, 105 S. Ct. at 2397.

In Coyne, the pertinent issue was whether a Maine statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing was preempted by the NLRA. Coyne, 482 U.S. at 3-4, 96 L. Ed. 2d at 6-7, 107 S. Ct. at 2213-14. Citing Metropolitan Life, the United States Supreme Court found that the Maine severance pay statute was not preempted by the NLRA, because it was a minimum labor standard that did not impermissibly intrude on the collective-bargaining process. Coyne, 482 U.S. at 22-23, 96 L. Ed. 2d at 18, 107 S. Ct. at 2223. The Supreme Court further held:

> "It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations. [Citations.] Absent a collective-bargaining agree-

> ment, for instance, state common law generally permits an employer to run the workplace as it wishes. The employer enjoys this authority without having to bargain for it. The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions; that same state law defines the rights and duties of employees. Similarly, Maine provides that employer and employees may negotiate with the intention of establishing severance pay terms. If impasse is reached, however, pre-existing state law determines the right of employees to a certain level of severance pay and the duty of the employer to provide it. Thus, the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for 'there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining.' [Citation.]" Coyne, 482 U.S. at 21-22, 96 L. Ed. 2d at 17-18, 107 S. Ct. at 2222-23.

Similarly, in the present case, section 3.1 of the Act provides rest breaks and a meal period for union and nonunion hotel room attendants in Cook County and neither encourages nor discourages the collective bargaining processes that are the subject of the NLRA. Section 3.1 thus provides minimum standards indepen-

dent of the collective bargaining process that devolve on the Cook County hotel room attendants as individual workers, not as members of a collective organization. Accordingly, Garmon preemption is not applicable here.

Plaintiff contends that section 3.1 does not constitute a "true" minimum labor standard because it does not apply statewide, but only to hotel room attendants in Cook County. Plaintiff's argument is unavailing. Minimum labor standards need not necessarily apply statewide but, as discussed, must "affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." Metropolitan Life, 471 U.S. at 755, 85 L. Ed. 2d at 750, 105 S. Ct. at 2397. Section 3.1 meets the requirements of a minimum labor standard and thus are not preempted under Garmon.

Plaintiff also contends that the penalties imposed by section 3.1 for failing to comply with the rest break requirements violates Garmon and provides grounds for preemption as such penalties are not provided for in the NLRA. Plaintiff's argument is unavailing, as section 3.1's private cause of action supports the minimum labor standards provided for in section 3.1 and is not inconsistent with the statutory scheme of the NLRA.

Nor is Machinists preemption applicable. Machinists prohibits the imposition of "additional restrictions on economic weapons of self-help, such as strikes and lockouts [citation], unless such restrictions

presumably were contemplated by Congress." Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614-15, 89 L. Ed. 2d 616, 624, 106 S. Ct. 1395, 1399 (1986). Section 3.1 of the Act does not proscribe or support strikes, lockouts, use of replacement workers, or any other economic weapon of self-help that Congress intended to leave unregulated. Accordingly, Machinists is inapplicable to section 3.1 of the Act.

For the foregoing reasons, we affirm the circuit court.

Affirmed.

GALLAGHER and O'MARA FROSSARD, JJ.'s concur.

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(2)

No. 09-14

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CATHERINE SHANNON,
Director of the Illinois Department of Labor, *et al.*,

Petitioners,

v.

520 SOUTH MICHIGAN AVENUE ASSOCIATES, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF ISSUE

Whether in consistently applying other circuits' decisions and decisions of this Court the court of appeals correctly interpreted a state statute mandating by state law additional employee work breaks and drastic remedies beyond the minimum breaks already provided for by state law for a narrow group of employers in a specific industry located within a narrow geographic region with a large union presence as being preempted by federal labor laws and improperly interferes with the free play of economic forces that Congress intended to remain unregulated in the labor field?

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For years, Illinois by statute provided that employees who worked more than seven and one-half continuous hours were entitled to a minimum twenty minutes meal period. This minimum break period was explicitly deemed inapplicable where meal periods were established through the collective bargaining process. 820 ILCS 140/3. Effective August 15, 2005, 2005 ILL. ALS 593, Illinois enacted the Hotel Room Attendant Amendment ("Attendant Amendment"), 820 ILCS 140/3.1, which provided a vastly more liberal break period for a small, select group of hotel room attendant workers working within a single Illinois county and failed to exclude from application workers whose meal periods were established through a collective bargaining process or employers employing eligible room attendants like the Respondent, 520 South Michigan Avenue Associates, Ltd., d/b/a The Congress Plaza Hotel & Convention Center ("Congress Plaza Hotel"), who were governed by the National Labor Relations Act, 29 U.S.C. §151 *et seq.* ("NLRA"). In addition, a unique whistle blower enforcement mechanism and drastic remedies were provided in the Attendant Amendment. If an employee established that he or she exercised rights under the amendment or simply "alleged" in good faith that an employer was not complying the amendment, and the employee was thereafter terminated, demoted, or otherwise penalized, the statute imposed a rebuttable presumption deeming that the employer's action was taken in retaliation for the exercise of rights under the amendment, with the burden of *proof* then shifting to the employer to "prove that the *sole* reason for the termination, demotion, or penalty was a legitimate business reason." 820 ILCS 140/3.1(g) (emphasis added). Successful claimants were entitled to relief in the form

of back pay, reinstatement, and injunctive relief and in some cases, *treble* their lost normal daily compensation and fringe benefits, along with interest, consequential damages, and attorney's fees and costs. 820 ILCS 140/3.1(h).

Even though the earlier statutory minimum twenty minute meal period had not been repealed, Petitioners attempted below to justify the Attendant Amendment as being constitutional and was not preempted under the NLRA claiming it was a permissible "minimum labor standard" allowed under *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754 (1985) and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 (1987). Applying the standards this Court set forth in *Metropolitan Life* and *Fort Halifax* along with other court of appeal decisions, the Seventh Circuit Court of Appeals rejected Petitioners' defense of the Attendant Amendment and ruled that the law had exceeded the scope of what constitutes a permissible "minimum labor standard." Petitioners mischaracterize the impact of the court of appeals decision by claiming certiorari review by this Court is appropriate because lower courts are divided over whether minimum labor standards are preempted by federal labor law, that the court of appeals decision is incompatible with decisions of this Court, and that the court of appeals decision casts doubt on the validity of existing workplace protection laws. The Petition fails to support these claims with sound substantive argument and vastly overstates the impact of a decision that narrowly applies to a specific occupation, in a specific industry, in a specific county and does not adequately justify the exercise of this Court's jurisdiction.

First, lower courts are not divided over whether minimum labor standards are preempted by federal labor law. The basic principles of law in this area are well established and are uniform. This Court has already published cases stating that true minimum labor standards are not preempted and when they are consistent with the standards this Court set forth in *Metropolitan Life* and *Fort Halifax*, they will be sustained as valid.

Second, the court of appeals decision is not incompatible with decisions of this Court. The decision relies on the very standards set forth by this Court in *Metropolitan Life* and *Fort Halifax* in holding that the law is preempted by federal labor laws. Since Illinois has already established the appropriate break minimum to be twenty minutes, and that law was still a valid statute applicable to all workers-even hotel workers-when the Attendant Amendment was passed, the court of appeals appropriately ruled Illinois had exceeded its powers in attempting to enact further regulation under the disguise of a minimum labor standard.

Third, there is absolutely no basis for Petitioners to assert that the court of appeals decision will case doubt on workplace protection laws throughout the United States. The court of appeals decision does not set forth new law nor does it expand the restrictions pronounced by this Court on when the law will and will not constitute a valid minimum labor standard. Rather, it simply decided that Illinois went too far in passing the Attendant Amendment using the very standards this Court set forth in earlier decisions. Other workplace protection laws throughout the United States remain valid and enforceable.

STATEMENT OF THE CASE

A. The Underlying Case

Effective August 15, 2005, 2005 ILL. ALS 593, Illinois enacted the Attendant Amendment providing that only hotel room attendant workers working within a single Illinois county must be provided two paid fifteen minute rest breaks and one thirty minute meal break. 820 ILCS 140/3.1. An earlier version of the paid break law, *not* repealed as of the passing of the Attendant Amendment and still a valid Illinois statute of general application, provided that all Illinois workers working more than seven and one-half continuous hours were entitled to a minimum twenty minute meal period. Unlike the Attendant Amendment, the initially enacted minimum break period is explicitly deemed inapplicable where meal periods are provided for in a collective bargaining process. 820 ILCS 140/3. As set forth above, the Attendant Amendment also provided a drastic whistle blower enforcement mechanism making available to employees bountiful remedies which also shifted the burden of proof to the employer where an employee alleged there was a violation of the Attendant Amendment. Where an employee simply "alleged" in good faith that an employer was not complying the new break law, and the employee was thereafter terminated, demoted, or otherwise penalized, the statute imposed a rebuttable presumption deeming that the employer's action was taken in retaliation for the exercise of rights under the Attendant Amendment. Thereafter, the burden of *proof* shifted under the statute to the employer requiring it to "prove that the *sole* reason for the termination, demotion, or penalty was a legitimate

business reason." 820 ILCS 140/3.1(g) (emphasis added). The remedies available to a successful claimant include back pay, reinstatement, and injunctive relief and in some cases, *treble* their lost normal daily compensation and fringe benefits, along with interest, consequential damages, and attorney's fees and costs. 820 ILCS 140/3.1(h).

The Congress Plaza Hotel challenged the Attendant Amendment as being passed in violation of the United States Constitution Supremacy Clause and contended that the Attendant Amendment was preempted under the NLRA. Petitioners responded to the challenge by claiming that the Attendant Amendment was not preempted and constitutes a permissible "minimum labor standard" allowed under *Metropolitan Life* and *Fort Halifax*. The Seventh Circuit Court of Appeals rejected Petitioners' defense of the Attendant Amendment ruling that the law had vastly exceeded the scope of what Petitioners claim was a permissible "minimum labor standard." The Attendant Amendment did not simply form a backdrop for negotiations or constitute an isolated statutory provision of general application as approved in this Court's *Metropolitan Life* and *Fort Halifax* decisions addressing the same subject. Instead, the court of appeals concluded, rather than being a law of general application, the Attendant Amendment was much more invasive and impermissibly targeted a specific occupation, in a specific industry, in a specific county.

REASONS FOR DENYING THE PETITION

I. Lower Courts Are Not Divided Over Whether Minimum Labor Standards Are Preempted By Federal Labor Law.

1. To establish a conflict among the federal appellate courts, Petitioners must identify some appellate court decision involving the same important matter that is actually in conflict with the challenged decision and not merely assert that the case challenged was incorrect in distinguishing the application of one case over another. Sup. Ct. R. 10. The cases referenced by Petitioners fail to show any actual conflict between the court of appeals decision and decisions in other circuits involving the same matter. For example, Petitioners take issue with the court of appeals decision and its reliance on *Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497 (9th Cir. Cal. 1995) in its analysis. Pet. at 13 and 14. Petitioners describe *Bragdon* as being in conflict with *Associated Builders & Contractors of So. Cal., Inc. v. Nunn*, 356 F.3d 979, 990 (9th Cir. 2004). Pet. at 15. However, *Bragdon* was already published when *Nunn* was decided and the Ninth Circuit did not overruled *Bragdon* even though both decisions are from the same circuit. Further, this Court did not determine there to be a conflict between the two cases sufficient to warrant further review since this Court refused issuance of a writ of certiorari of the later *Nunn* decision when review was sought in that case. See, *Associated Builders & Contrs. of S. Cal., Inc. v. Acosta*, 543 U.S. 814 (2004).

Petitioners' reliance upon *Dillingham Constr. N.A. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482 (9th Cir. Cal. 1996), and *National Broadcasting Co. v. Bradshaw*, 70 F.3d 69 (9th Cir. Cal. 1995) (Pet. at 14 and 15) do not show any conflicts in the circuits but instead simply demonstrate that some laws enacted pass constitutional challenge while others do not. Likewise, *Rondout Elec., Inc. v. N.Y. State DOL*, 335 F.3d 162 (2d Cir. N.Y. 2003)(Pet. at 14) did not reject the analysis relied upon by *Bragdon* to support its decision. Instead, the *Rondout* court merely distinguished the decision as being inapplicable to its holding. See, *Rondout Elec.*, 335 F.3d at 169 ("[h]aving distinguished *Bragdon*, we have no need to decide whether Bragdon was correctly decided on its own facts").

Finally, *Washington Serv. Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995)(Pet. at 17) was adequately addressed by the Seventh Circuit Court of Appeals in its opinion when the court noted that the statute in *Washington Serv.* did not simply target a "particular occupation," as Petitioner suggests, but instead by its terms it expressly applied to multiple occupations including "persons who performed 'food, janitorial, maintenance, or nonprofessional health care services,'" *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1135 (7th Cir. 2008), something the Attendant Amendment fails to do. Again, as the court of appeals noted, *Washington Serv.* is not in conflict with the underlying decision but instead is simply not supportive of Petitioners' claim.

In sum, a careful examination of the cases relied upon by Petitioners to seek review shows no conflict between the underlying decision and decisions of other circuits. Instead, the cases uniformly apply the reasoning and standards set forth by this Court in the *Metropolitan Life* and *Fort Halifax* decisions and adequately decide which challenged laws fall within constitutional guidelines and which do not. No new standards are developed in the underlying opinion and the opinion does not conflict with the standards used in other cases.

2. Despite Petitioners' claims, it was not just the Attendant Amendment's targeting of a specific and narrow group or class of workers in a specific and limited locale that the court of appeals found failed to pass constitutional muster. Pet. at 17. The court of appeals also considered the unique and drastic enforcement and remedies section of the law to determine it unfairly intruded on federal labor laws. *Shannon*, 549 F.3d 1136. Other decisions that recognize and acknowledge that statutes in other areas of law sometimes target specific populations (Pet. at 17) does not show a conflict in the underlying decision but simply recognizes a state of the laws on the books. Unless the laws are challenged as being in conflict with federal labor laws, acknowledging that legislation targeting specific communities is an inconsequential fact. When targeted legislation unduly intrudes upon an area that Congress has preempted, then the legislation is subject to being challenged.

3. Finally, the fact that the court of appeals decision rejects the appellate court decision of the State of Illinois upholding the law is an insufficient reason for review under Rule 10. Pet. at 20. Rule 10 requires that there be a conflict either with a decision of another United States court of appeals or a conflict between a decision by a state court of last result. Sup. Ct. R. 10. Here, the matter was addressed by an Illinois appellate court, not the Illinois Supreme Court. As the court of appeals duly noted, "[w]e 'owe[ ] no deference to state-court interpretation of the United States Constitution.'" *Shannon*, 549 F.3d at 1124.

II. The Decision Is Not Incompatible With The Decisions Of This Court.

As noted earlier, the court of appeals decision is not incompatible with decisions of this Court. The court of appeals decision relies on the same standards set forth by this Court in *Metropolitan Life* and *Fort Halifax* along with other circuit court decisions in ruling that the Attendant Amendment is preempted by federal labor laws. Illinois had already established the appropriate break minimum to be twenty minutes, and this law was still a valid statute applicable to all workers when the Attendant Amendment was passed. Applying *Metropolitan Life* and *Fort Halifax*, the court of appeals simply ruled that Illinois had exceeded its powers in attempting pass the Attendant Amendment by claiming it was a permissible minimum labor standard when the state had already set the minimum break at twenty minutes. Petitioners fail to recognize that it was not simply the multiple breaks that the Attendant Amendment provided or the Illinois legislature's

attempt to target and benefit a small labor pool with a strong union presence that the court of appeals considered in determining the law was preempted. Rather, it was also the exceedingly harsh and drastic enforcement mechanism, unlike any other law Illinois had on the books, that the court of appeals found to be an intolerable interference with federal labor law.

Finally, the court of appeals did not invalidate the Attendant Amendment because the law did not contain an "opt-out" for labor agreements as Petitioners contend. Pet. at 32. Indeed, the court of appeals noted that had the law constituted a true minimum labor standard that did not interfere with the collective bargaining process, "the fact that the State law mandates different terms and conditions than those contained in an expired CBA would be irrelevant." *Shannon*, 549 F.3d at 1139. Contrary to the assertion of Petitioners, true minimum labor standard laws can be applied to change the terms of the bargaining agreement and do not need "opt-out" language to pass constitutional standards.

III. The Court Of Appeals Decision Does Not Cast Doubt On Workplace Protection Laws.

For their final argument in favor of review, Petitioners assert that the court of appeals decision will case doubt on workplace protection laws throughout the United States. Pet. at 35. This unfounded fear is countered by the fact that Petitioners fail to cite to a single workplace protection law that has been ruled unconstitutional based on the court of appeals decision even though the decision has been published since

December 2008. The decision neither sets forth new law nor different standards than those pronounced by this Court in *Metropolitan Life* and *Fort Halifax* as to when a law will constitute a valid minimum labor standard. Rather, the opinion simply decided that Illinois went too far in passing the Attendant Amendment using the very standards this Court provided in earlier decisions. In fact, Petitioners themselves concede to the lack of significance in the underlying decision by arguing that only the Respondent will be bound by the decision. Pet. at 21. According to Petitioners, all other hotels are bound by the challenged law in light of the earlier Illinois appellate court opinion upholding the law. Therefore, the importance and impact of the decision is negligible in Illinois.

Petitioners assert that it is common for other state laws to provide minimum labor standards that target particular occupations and locales. Pet. at 36. However, these laws do not explicitly limit their application to a finite geographic location and designated class of workers where union membership is strongest. Instead, they apply to occupations throughout the state. Further, no where do Petitioners cite to a workplace protection statute that provides such drastic and unique enforcement mechanisms and remedies. The Attendant Amendment does not merely create a "rebuttable presumption" (Pet. at 40) if adverse action is taken. Instead, it completely shifts the burden of proof to the employer and then demands that it *prove* that the *sole* reason for the termination, demotion, or penalty was a legitimate business reason.

CONCLUSION

For all the reasons set forth above, This Court should deny the Petition for Certiorari.

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No. 09-14

In the Supreme Court of the United States

CATHERINE SHANNON, DIRECTOR OF THE ILLINOIS DEPARTMENT OF LABOR, *ET AL.*, PETITIONERS,

v.

520 SOUTH MICHIGAN AVENUE ASSOCIATES, LTD., RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTRODUCTION

This case turns on the proper construction of the term "minimum labor standard." In its decision below, the Seventh Circuit acknowledged the "sparse" "guidance" available to lower courts in interpreting this critical phrase, App. 22a—a lynchpin of federal labor preemption law. Without greater "guidance," two views have emerged over the term's proper meaning. Most courts adhere to this Court's pronouncement that a "minimum labor standard" is any state workplace regulation that applies to union and nonunion workers alike, and thus neither encourages nor discourages union membership and collective bargaining. But there is a competing view, as the Seventh Circuit recognized, and the decision below sided with that view as the "better reasoned" of the two. App. 26a. Under this construction, a state law is not a "minimum labor standard," even though it applies equally to union and non-union employees, if it targets particular classifications of workers in the labor market, or if it is too "stringent" in its substantive terms. The difference between these competing takes on the meaning of "minimum labor standard" was dispositive of respondent's claim here. There is no dispute that the challenged Illinois law does not regulate the process of collective bargaining and applies equally to union and nonunion employees. By eschewing the majority definition of a "minimum labor standard" and adopting the opposing view, however, the Seventh Circuit held the Illinois law preempted.

Respondent does not dispute that this case squarely raises the question presented and otherwise offers an ideal vehicle for addressing a critical and far-reaching aspect of federal labor law. Respondent, however,

entirely ignores the conflict over the minimum labor standard doctrine, while simultaneously espousing the Seventh Circuit's interpretation—which other courts have rejected and which cannot be squared with prior decisions of this Court. Respondent uses the question-begging phrases "true minimum labor standards," "permissible 'minimum labor standard,'" and "valid minimum labor standard," Br. in Op. 2, 3, by which respondent (like the Seventh Circuit) means a state law that does not target particular regions, occupations, or other classifications of workers, *id.* at 5, and whose substantive requirements and remedies a court does not view as overly strict, *id.* at 8.

Respondent never acknowledges that it is choosing sides in the dispute that the Seventh Circuit itself recognized, offers no means to reconcile the competing lower court decisions (except to say that "some laws enacted pass constitutional challenge while others do not," *id.* at 7), and makes no effort to square its reading of "minimum labor standards" with decisions by this and other courts. Pet. 13-22, 23-34. The question presented is the subject of renewed confusion on an issue at the core of federal labor law, and this case is an ideal vehicle for providing lower courts with critical guidance.

I. Courts Are Divided Over Whether Targeted Minimum Labor Standards Are Preempted By The NLRA.

1. In its decision below, the Seventh Circuit observed that this Court has provided only "sparse" "guidance" to assist lower courts in determining whether state laws constitute minimum labor standards and thus avoid NLRA preemption. App. 22a. The Seventh Circuit then identified two competing lines of decision from the federal courts of appeal and adopted the approach—articulated in *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995)—that it considered the "better reasoned" of the two. App. 26a. Without even mentioning this express acknowledgment of a circuit split, respondent insists that "a careful examination of the cases relied upon by Petitioners to seek review shows no conflict between the underlying decision and decisions of other circuits." Br. in Op. 8. But respondent does not identify any legal principles or even facts that explain the divergent outcomes between the decision below and the cases cited in the petition. In the end, respondent cannot avoid the circuit split, for the decision below is impossible to reconcile with decisions of the Second, Ninth, and D.C. Circuits. See Pet. 13-18.

First, respondent claims there is no conflict between the *Bragdon* approach (adopted by the court below) and subsequent decisions of the Ninth Circuit. But in a series of cases after *Bragdon*, the Ninth Circuit affirmatively rejected the *Bragdon* analysis. Pet. 14-16 (discussing *Dillingham Constr. N.A. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999); *Viceroy Gold*

Corp. v. Aubry, 75 F.3d 482 (9th Cir. 1996); *Nat'l Broad. Co., Inc. v. Bradshaw*, 70 F.3d 69 (9th Cir. 1995); and *Associated Builders & Contractors of S. Cal., Inc. v. Nunn*, 356 F.3d 979 (9th Cir. 2004)). Although acknowledging these decisions, Br. in Op. 6-7, respondent makes no meaningful effort to reconcile them with *Bragdon*. About the targeted workplace laws that survived preemption challenge in *Dillingham*, *Viceroy*, and *Bradshaw*, respondent proffers merely that they "demonstrate that some laws enacted pass constitutional challenge while others do not." *Id.* at 7. But as to why the circumstances underlying *Bragdon* supported a finding of preemption and the others did not, respondent has no explanation.

Respondent also finds solace in the fact that the Ninth Circuit in *Nunn* did not overrule *Bragdon* in its entirety and that this Court did not grant certiorari. Br. in Op. 6. But *Nunn* took pains to reject *Bragdon*'s reasoning on the precise issue for which the Seventh Circuit found *Bragdon* "better reasoned"—the notion that state laws cease to be "minimum labor standards" if they target particular classifications of workers. Pet. 15-16 & n.3. As for the denial of certiorari in *Nunn*, that "[o]f course * * * imports no expression of opinion upon the merits of the case, as the bar has been told many times." *Mo. v. Jenkins*, 515 U.S. 70, 85 (1995) (internal quotations omitted). The denial in *Nunn* is particularly inconsequential, for petitioner in that case sought review solely on a question of ERISA, and not NLRA, preemption. Pet. for Writ of Cert., *Associated Builders & Contractors of S. Cal., Inc. v. Acosta*, No. 03-1582, 2004 WL 1175135 (U.S. May 13, 2004).

Next, respondent suggests there is no conflict between the Seventh and the Second Circuits but does not mention, much less attempt to distinguish, the latter's decision in *General Electric Co. v. New York State Department of Labor*, 891 F.2d 25 (2d Cir. 1989), which the petition discussed at length. Pet. 16-17. In an effort to put the Second Circuit to the side, respondent posits merely that that court "did not reject the analysis relied upon by *Bragdon*" in *Rondout Electric, Inc. v. New York State Department of Labor*, 335 F.3d 162 (2d Cir. 2003). Br. in Op. 7. But *Rondout* was far from agnostic toward *Bragdon*; the Second Circuit made its skepticism clear by openly questioning "whether *Bragdon* was correctly decided." *Rondout*, 335 F.3d at 169. The Third Circuit expressed similar skepticism, while also distinguishing *Bragdon* on its facts. *The St. Thomas–St. John Hotel & Tourism Ass'n v. Gov't of U.S. Virgin Islands*, 218 F.3d 232, 244 (3d Cir. 2000).

Finally, respondent merely parrots the Seventh Circuit's effort to distinguish the Amendment challenged here from the law upheld in *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811 (D.C. Cir. 1995), stating that the latter statute targets "multiple occupations" rather than one. Br. in Op. 7. But respondent does not begin to explain (and neither did the Seventh Circuit, App. 26a n.8) how this is a meaningful distinction. There is no reason why a law targeting the employees of District of Columbia "contractors" "who employ 25 or more persons and perform food, janitorial, maintenance, or nonprofessional health care services," *Washington*

Serv., 54 F.3d at 813-814, is any broader in scope than a law targeting all hotel room attendants in one of the nation's largest counties, much less why the relative breadth of these laws would be legally material.

2. Unable to explain away the circuit split, respondent notes that the Seventh Circuit also pointed to the Amendment's anti-retaliation and enforcement provision as support for its finding of preemption. Br. in Op. 8. But the court below also endorsed *Bragdon*, which did not review any enforcement mechanism, as the "better reasoned" among competing views, indicating that the Amendment's enforcement mechanism was not determinative of the outcome below. In any event, separate from its analysis of the Amendment's targeted scope, what the Seventh Circuit concluded was that the Amendment's enforcement mechanism violated a supposed rule that only "low-threshold" laws that would not be "difficult for [a] union to bargain for" qualify as minimum labor standards. App. 35a. Respondent does not even attempt to defend that aspect of the Seventh Circuit's decision, which cannot be reconciled with this Court's cases. Pet. 30.

3. Respondent does not deny that the decision below squarely conflicts with *Illinois Hotel & Lodging Association v. Ludwig*, 869 N.E.2d 846 (Ill. App. Ct. 2007), which sustained the Amendment against an identical preemption challenge. See also *S. Cal. Edison Co. v. Pub. Utils. Comm'n*, 45 Cal. Rptr. 3d 485, 497-498 (Ct. App. 2006) (upholding prevailing wage law over preemption challenge and rejecting *Bragdon* analysis). Rather, respondent observes that the Illinois Appellate

Court is not "a state court of last res[ort]" and claims that *Ludwig* is therefore immaterial to this Court's certiorari determination. Br. in Op. 9. But this Court has often considered the decisions of intermediate state courts in granting certiorari review. See, *e.g.*, *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 414-415 & n.5 (1998). In addition to the circuit split, this Court should grant certiorari because the conflict between the decision below and *Ludwig* leaves petitioner Shannon in an untenable position in trying to enforce State law fairly, Pet. 20. Cf. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 372 (1969) (certiorari granted to address preemption under Railway Labor Act after state appeals court found federal preemption, in conflict with federal circuit court decision on same issue).

II. The Opinion Below Is Incompatible With Decisions Of This Court.

Respondent's attempt to reconcile the decision below with this Court's decisions in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), is unsuccessful. The characteristics of the Amendment that respondent highlights have no relevance to the preemption analysis applied in this Court's decisions.

First, respondent stresses that, before the Amendment, Illinois law "already established the appropriate break minimum to be twenty minutes." Br. in Op. 9. But this Court has never suggested that state workplace laws must be static. Pet. 31. To the contrary, problems of legislative classification are

"perennial," and the legislature may determine the need for different remedies based upon different circumstances as it perceives them. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955). Accordingly, reform may proceed one step at a time, as lawmakers address problems incrementally, see *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (upholding state minimum wage for hotel "chambermaids" over substantive due process challenge). That is what occurred here, as the Illinois General Assembly acted to address the conflicting concerns of hotel employers and employees in different parts of the State. Pet. 5-7.

Second, respondent challenges the Amendment as an effort to "target and benefit a small labor pool with a strong union presence." Br. in Op. 10. But *Metropolitan Life* and *Fort Halifax* rejected arguments that purported evidence of legislative attempts to target union-heavy classifications or supplant the substantive results of collective bargaining triggers federal preemption. Pet. 8-29. These decisions establish that the targeted workforce's level of unionization is irrelevant to preemption analysis. In any event, there was no evidence here suggesting that the Amendment provides a special benefit for unionized workers, let alone a "small" group of them. The law applies broadly to union and nonunion hotels throughout one of the most populated counties in the nation.

Third, respondent argues that the Amendment was properly struck down because it has an "exceedingly harsh and drastic enforcement mechanism, unlike any other law Illinois had on the books." Br. in Op. 10. In fact, this Court has never suggested that a reviewing

court's view of a regulation's "harshness" is relevant to federal labor preemption. In *Metropolitan Life* and *Fort Halifax*, the Court upheld state laws imposing obligations on employers at least as "stringent" as the Amendment's. Pet. 30. There is nothing uniquely "drastic" about the Amendment's anti-retaliation provision in any event: States, including Illinois, often authorize multiple-damage awards and attorneys' fees for plaintiffs who vindicate socially beneficial statutory rights. See, *e.g.*, 740 ILCS 175/4(g) (2008) (Illinois Whistleblower Reward and Protection Act); 740 ILCS 10/7(2) (2008) (Illinois Antitrust Act). Nor is the Amendment's rebuttable presumption of retaliation out of the ordinary. Pet. 39-40.

Finally, respondent accuses the petition of mischaracterizing the Seventh Circuit's holding that the Amendment is in part preempted because it lacks an "opt-out" provision exempting employees subject to a collective bargaining agreement from its coverage. Br. in Op. 10. Respondent recognizes that state workplace laws "can be applied to change the terms of the bargaining agreement and do not need 'opt out' language to pass constitutional standards." *Id.*; see also Pet. 32. But that is precisely the point. To support its preemption finding, the Seventh Circuit incorrectly relied on the facts that the One Day Rest in Seven Act had an opt-out for collective bargaining arrangements but the Amendment does not. App. 34a.

III. The Issue Presented Is One Of Critical Importance, And The Decision Below Casts Doubt On Many Workplace Laws.

The petition describes numerous state and local workplace laws that, for purposes of federal preemption, are materially indistinguishable from the Amendment and thus threatened by the decision below. Respondent answers that no court has yet relied on the Seventh Circuit's decision to invalidate a substantive workplace law. Br. in Op. 10-11. Given that the decision was issued less than nine months ago, however, that is hardly telling. Far more probative is the fact that litigants are citing the decision already as authority for a radical expansion of federal preemption principles in both federal and state courts.

For example, although a law's "stringency" and the fact that it targets particular classifications of workers are inappropriate considerations for preemption purposes, *supra* pp. 1, 8-9; see also Pet. 23-34, litigants now routinely cite the Seventh Circuit's decision for the contrary position.

In *California Grocers Association v. City of Los Angeles*, 98 Cal. Rptr. 3d 34 (Ct. App. 2009), a challenge to Los Angeles's law requiring grocery employers to retain their predecessor's workforce for 90 days after the sale of a store, the challengers argued that, under *Bragdon* and the decision below, the NLRA preempts any law that "'targets particular workers in a particular industry' for special protection as to rights that would normally be the subject of collective bargaining." Br. of Pl., 2008 WL 5632131, at *48 n.16. And their amici

cited the decision below for the principle that "[w]here a state or local law seeks to impose greater damages than warranted under the circumstances * * * the law is not a legitimate 'minimum labor standard.'" Br. of Amici Curiae Employers Group & Chamber of Commerce of the U.S., 2009 WL 741996, at *11. The appellate court ultimately held the law preempted, in recognized conflict with the rule adopted by the D.C. Circuit in *Washington Service Contractors Coalition, supra*. *Cal. Grocers*, 98 Cal. Rptr. 3d at 54.

Filings in other cases are to the same effect. See, *e.g.*, Reply Mem. of Def. in Supp. of Mot. to Dismiss, *Rodriguez v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 09-cv-00016, 2009 WL 2590999 (D. Haw. May 11, 2009) (urging preemption under decision below because state law "imposes treble damages, attorneys' fees, and costs—remedies far more severe than those allowed under the NLRA or the [defendant's collective bargaining agreement]"); Pl.'s Br. in Supp. of Mot. for Summ. J., *Metro. Milwaukee Chamber of Commerce v. City of Milwaukee*, No. 08-cv-18220, at 10-11 (Wis. Cir. Ct. March 5, 2009) (urging preemption under decision below because municipal ordinance "sets terms that are beyond what * * * unions have been able to achieve at the bargaining table"). Clearly, the decision below has profoundly unsettled an important area of labor law.

In its final argument, respondent returns to immaterial distinctions, this time between the Amendment and the analogous workplace protection laws cited in the petition. But again, respondent's focus on the level of union membership in Cook County and the Amendment's anti-retaliation provision cannot bear

the weight respondent places on them. *Supra* pp. 8-9. And as for the fact that the Amendment does not apply statewide, Br. in Op. 11, respondent ignores the state prevailing wage laws cited in the petition that apply differently to different geographic areas, as well as the municipal ordinances, which by their nature do not apply statewide, Pet. 38-40. The decision below casts these and other laws into doubt.

* * *

In sum, the Seventh Circuit's approach to NLRA preemption encourages courts to engage in a level of scrutiny of state employee protection laws at odds with the States' traditional authority to regulate the workplace—authority that Congress did not purport to displace. While "[t]here was a time when" federal courts "presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause," *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 347 (2007) (citing *Lochner v. N.Y.*, 198 U.S. 45 (1905)), the Court has long since rejected such "invitations to rigorously scrutinize economic legislation passed under the auspices of the police power," *ibid.* In the decision below, however, the Seventh Circuit "seek[s] to reclaim that ground for judicial supremacy" through an expansive approach to preemption. *Ibid.* This Court's intervention is necessary to avoid a substantial increase in litigation over state and local workplace laws, as well as a revival of judicial interference in the substance of state economic regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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